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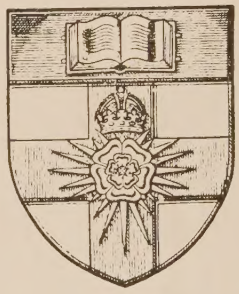

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2nd August, 1870.

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AND

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Appeal Cases

BEFORE

THE HOUSE OF LORDS.

ENGLISH AND IRISH APPEALS.

HARRY STEPHEN THOMPSON AND G. H. SEYMOUR . . . . . } APPELLANTS;

AND

GEORGE HUDSON AND OTHERS . . . . RESPONDENTS.

1869
Feb. 26;
March 1, 2, 4.

Agreement—Conditions—Original Debt—Penalty—Waiver.

The reservation of a right to have full payment of money actually due on an existing contract, should there be a failure to pay a smaller sum on a day certain, cannot be treated as a penalty.

Therefore, where a certain sum of money is due, and the creditor enters into arrangements with his debtor to take a lesser sum provided that sum is secured in a certain way and paid at a certain day, but if any of the stipulations of the arrangement are not performed as agreed upon, the creditor is to be entitled to recover the whole of the original debt, such remitter to his original rights does not constitute a penalty, and Equity will not interfere to prevent its observance.

If, in such a case, it is one of the stipulations that a mortgage is to be given on a certain day, and it is not given till two days afterwards, and is then accepted by the creditor, such acceptance, though a waiver as to the mortgage, is not a waiver of the creditor's general rights on the contract.

H. was indebted to *T.* and *S.* in three different sums of money, which were the subjects of suits in Chancery. In the first and third of these suits the sums had been ascertained, but no final decree had been made respecting them. In the second suit there had been a final decree. *H.* wished for time and facilities to be afforded him for payment of these debts. *T.* and *S.* consented, and deeds were executed by which it was arranged that *H.* should admit the amount of the debts claimed in the first and third suits, and

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should not use his power to appeal against the decree in the second suit; that he should give a first mortgage on his real estate as a security; and that he should pay certain amounts on certain days. On these conditions *T.* and *S.* were to accept smaller sums in satisfaction. The deeds contained provisoes which (in different forms of language) expressly reserved to *T.* and *S.* the right, if any of the stipulations in the deeds were violated, to enforce payment of the original amounts found and admitted to be due:—

Held, that this reservation of the right to enforce existing debts on non-payment of the smaller and covenanted amounts, was not a penalty against which Equity would grant relief.

THIS was an appeal against an Order of the Master of the Rolls, which had been confirmed on appeal by Lord Chancellor *Chelmsford, diss.* Lord Justice *Turner.* The case has already been fully reported (1).

The following is a summary of the matters necessary for this report. The Appellants represent the *York and North Midland Railway Company*, whose rights have since passed to the *North Eastern Railway Company.* In 1853, *Hudson* was seised in fee of two estates, called the *Newby Park* estate and the *Whitby* estate, and other property in *Yorkshire;* together with property at *Albert Gate, Kensington,* in the county of *Middlesex.* He was also the holder of 1500 shares in the *Sunderland Dock Company*, and other property. In October, 1853, he had entered into a contract to sell the *Newby Park* estate to Lord *Downe,* and the purchase was to be completed on the 6th of April, 1854. Three suits were pending against *Hudson* on the part of the railway company; and on the 9th of December, 1853, an Order of the Court of Chancery was made in one of these suits (the second), directing that *Hudson* should pay to the company, before the 1st of August, 1854, the sum of £54,590 13*s.* 10*d.*, with interest at 5 per cent., calculated from the 19th of July, 1853, on the sum of £40,021 7*s.* 11*d.* principal money; and that he should pay the sum of £20,000 into Court before the first day of the ensuing Hilary Term, and the farther sum of £34,590 13*s.* 10*d.* before the first day of the ensuing Easter Term; and some other directions were given. This Order was duly registered as a judgment, and notice of it given to Lord *Downe.* In the two other suits (the first and third) Orders had been made against *Hudson* for accounts, and sums of £4104 and

(1) Law Rep. 2 Eq. 612; Id. 2 Ch. Ap. 255.

of £14,831 were claimed and found against him, but no formal decrees had been drawn up fixing those amounts.

In January, 1854, an agreement was made between the Appellants and *Hudson*, by which, in substance, it was arranged that *Hudson* was to admit the sums found to be due, and to give up any right to appeal, and also give a mortgage, which should be a first mortgage on the estate sold to Lord *Downe;* and the company consented to give time for these payments, and to accept the mortgage, with a reservation of its original rights under the decree unless these stipulations were performed.

In February, 1854, *Hudson* mortgaged the *Newby Park* estate to *Thompson* and *Seymour*, as trustees for the company. By an Act of Parliament passed some time afterwards, the *York and North Midland Railway Company* was merged in the *North Eastern Railway Company*, of which *Thompson* and *Seymour* (the Appellants) then became the representatives.

The stipulations of the agreement were not performed by *Hudson*, and he applied to the Appellants to vary the terms of it. This was consented to in August by an agreement, the terms of which were made the subject of formal deeds executed between the parties in October, 1854. In all these instruments the original rights of the company were expressly reserved. The terms of these deeds are not here set out, because as the very words of the reservations of the original rights of the company were fully quoted by the noble and learned Lords in their judgments, it has been deemed advisable not to repeat them.

The stipulations in these deeds on the part of *Hudson* were not performed; and in 1863 the Appellants, on behalf of the company, filed a bill against *Hudson*, and the incumbrancers on the estates (which had been assigned to secure payment of the claims of the company) calling for an account. The Master of the Rolls made an order accordingly, but declared that in his opinion the account must be taken on the footing of the claim of the company being restricted to the smaller sums contracted by the company to be taken in full satisfaction of the sums ordered by the original decree to be paid. His Lordship's opinion proceeded on the principle that the reserved liability to pay the larger sums, if the lesser or commuted sums were not paid at the time and in the

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manner specified, constituted a penalty; and he said that "this is a case in which the Court will relieve against the penalty, or, rather, will not enforce the penalty." (1)

On appeal, the Lord Chancellor (Lord *Chelmsford*) adopted the opinion of the Master of the Rolls. Lord Justice *Turner* dissented from it; and so the order of the Court below stood affirmed. This appeal was then brought.

Sir *R. Palmer*, Q.C., and Mr. *Mellish*, Q.C. (Mr. *G. Williamson* was with them), for the Appellants:—

This is a question of construction. The deeds contain certain covenants to which there are attached provisoes, and the real question is whether those provisoes are to be construed as penalties. If they are, Equity will not enforce them. The Appellants insist that that character cannot be given to them. There had been suits in Equity, and a decree made declaring certain sums to be due to the Plaintiffs in those suits, and declaring also the time at which those sums were to be paid. There were three suits, and the finding in each was in favour of the Appellants. A sum of £54,590 19*s.* 10*d.* in the second of those suits, where a decree was pronounced, was found to be due. An order was made for the payment of that sum on the 11th of January, 1854. The payment was not made as directed. Negotiations were entered into, and in August, 1854, an application was made to the Lords Justices to vary the order, and, by agreement between the parties, it was varied. That agreement was intended to be carried into effect by the deeds of October, which, granting many indulgences to *Hudson* on condition of his performing the stipulations therein contained, provided that, if he did not perform them, the rights existing under the suits in favour of the Appellants should be enforced against him. It is impossible to say that the reservation of an existing right, the exercise of which is forborne on certain conditions that are not complied with, can be called a penalty. The parties themselves seem to have anticipated and repudiated such a construction of their mutual dealings, for they expressly declare that what was then agreed upon was in addition to, and not in substitution for, the charges which the Court had decreed, and one of the stipula-

(1) Law Rep. 2 Eq. 624; Ibid. 2 Ch. Ap. 255.

tions is, that *Hudson* shall not be at liberty to dispute the amount of the principal or interest declared to be due. It will be contended that that itself is a penal provision, but it is nothing of the sort; it is one of the considerations which *Hudson* gives for forbearance as to the time of payment, and as to the amount to be paid. By offering or asking for these conditions he had induced the Appellants to grant him time, and to consent to a modification of the rights to which they were entitled. The reservation of the right, should these conditions of forbearance not be observed, to recur to the settled and decreed rights of the Appellants cannot in any way be treated as a penalty which Equity will not allow to be enforced. Here is a confession of a clear, original, and ascertained right, which is not to be strictly enforced if certain things are done, but if they are not done, there is simply a return to the original right. It is a violation of language to call that a penalty. A penalty is something new, imposed for the first time on the breach of a condition agreed upon with relation to a right then newly created; it is not a mere recurrence to an original right, but the creation of a new liability.

The principle of Equity against enforcing penalties cannot be applied to this case. Equity will always look to the substance of the transaction; if the substance is inequitable, Equity will relieve against it, or will not enforce it—if it is not so, Equity will enforce the agreement. It is not inequitable here. On the contrary, all the advantages as to time and amount are given to the debtor on the sole condition that he will do what he agrees to do as the purchase of his relief; if he neglects, he is simply not to obtain that relief. He did neglect, and he loses the advantage which the creditor had thus consented to allow him. This cannot be called in Law a penalty, however onerous may be the consequences which his own neglect to perform his own agreement entail on himself. These are the principles which govern this case. Now as to the authorities; they are in exact accordance with these principles. *Ex parte Bennet* (1) is the first. There Lord *Hardwicke* decided that if a creditor agrees to take less than is really due on the debtor paying it on a day certain, and the debtor fails in performing the condition, he cannot be relieved against the enforcement of the

(1) 2 Atk. 527.

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creditor's original rights. The same principle was applied in a different way in *Davis* v. *Thomas* (1). There the Plaintiff being entitled to the equity of redemption of certain premises conveyed the same to a mortgagee in consideration of £1800, made up of an original mortgage debt and of an additional sum of money paid to him. On the 1st of January, 1821, the mortgagee demised to the Plaintiff at a certain rent, and if the Plaintiff paid each half-year's rent on a fixed day named in the lease, he was to be at liberty at any time within five years to re-purchase the premises for a sum of £1850, but if he made default in the payment of the rent at the stated periods, the agreement was to be void. He did make defaults in the payment of the rent, but within the five years he claimed the right to re-purchase. The Master of the Rolls, Sir *J. Leach*, first, and then Lord Chancellor *Brougham*, held that there was no penalty in that case, and dismissed the bill which sought to enforce re-purchase under the agreement. It was held by the Court that time was of the essence of the contract; that where what was really a penalty or forfeiture was introduced by way of security, the Court would not enforce it, but where no penalty or forfeiture was introduced, but a privilege was conferred on a condition, the party claiming the benefit of the privilege must shew the performance of the condition. That case is directly applicable here—very strongly for the principle it asserts, though its facts are dissimilar. Then came the case of *Ford* v. *Chesterfield* (2), from which this case cannot be distinguished. There it was expressly held that where a mortgagee agrees to take a portion of his debt in lieu of the whole, upon payment on a given day, the Court will not relieve against the effect of non-payment on that day.

The cases relied on by the other side are two. The first is *Rose* v. *Rose* (3), but there the son was under no liability until he undertook the debt of the father. Here, on the contrary, was a clear original liability declared by decree of the Court. And even there Lord *Hardwicke*, after saying that Equity will relieve against penalties, added: "There are some exceptions to this rule; one of which is where a voluntary composition is to be paid at a time certain, and in a certain manner. In that case it is the voluntary

(1) 1 Russ. & My. 506. (2) 19 Beav. 428.
(3) Amb. 331.

bounty of the creditor to remit part of the debt, and the terms must be strictly complied with."

There is an Irish case of *Carroll* v. *O'Connor* (1). [Mr. *Jessel* said he did not mean to rely on that case.] Then *Rose* v. *Rose* (2) is really all that can be offered in the way of authority on the other side, and that case cannot govern the present, the facts in the two being essentially different.

The result, then, is clear. The larger right was not lost, but was in full existence when these deeds were executed, and these deeds merely stipulated that if the debtor performed certain acts the larger right should not be enforced against him, but a smaller right should be taken in satisfaction of it; but if the stipulations were not performed, the creditor was to be at liberty to enforce his original demands. He did not perform them, and so the advantage which would otherwise have been conceded to him was lost. A penalty itself would have been recoverable at Common Law, and it was only by the statute 8 & 9 Will. 3, c. 11, s. 8, that that was changed. This case in no way whatever falls within the provisions of that statute.

Mr. *Jessel*, Q.C., and Mr. *H. M. Jackson*, for the Respondents:—

There can be no argument founded on the original debt, for, first, by these deeds that debt was destroyed. Something else was created in its place. To the non-fulfilment of the conditions on which this new matter was created was attached a penalty, and that penalty Equity will not enforce. Secondly: Whatever were the stipulations of the agreement of January, 1854, the company afterwards waived the benefit of that agreement so far as it appeared to entitle the company to the benefit of the whole sum secured by the original decree. Thirdly: By the new agreement of August, and the fact that that agreement was executed prior to October, the right to revert or return again to the amount secured by the decree is gone, and it follows that that cannot be revived by making the proviso in the deed of October operate as a penalty. Fourthly: When all these instruments are construed together, it is plain that it was not intended to give any farther right than this, that the sum secured by the decree should remain as a col-

(1) 11 Ir. Eq. Rep. 200. (2) Amb. 331.

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lateral security for the payment of the smaller amount settled by the agreement. It never was intended to keep up the decree for any other purpose than that of a collateral security. Everything in the agreement of January, 1854, amounts to a mere penalty on *Hudson* if he does not perform the stipulations of the agreement of that date. It is not the restoration of original rights, but the creation of new advantages. And these are created upon considerations then and there given. The Appellants are to have the advantage of what they might not have had under the decree itself, for that decree might have been, and perhaps successfully, appealed against; but they seek to keep these, and, in addition, those which the decree would have given them. There was a right of appeal; that was to be surrendered. That itself was a good consideration for the new arrangement, and made the new arrangement something which was entirely independent of the old liability.

When is the larger payment now claimed to become due? when any one of the stipulations of the new agreement is not performed by *Hudson*. What is that but a penalty? It would arise on the non-performance of any one, even the most trivial, of the stipulations. [LORD WESTBURY:—The proviso is to the effect that if certain stipulations are not performed, the parties shall be remitted to their original rights. Is a remitter a penalty?] It may be so with reference to the circumstances under which it is made. It is so here, where *Hudson* gives up, as a consideration for the agreement of January, 1854, his right farther to contest the demands of the company, and his right to appeal against the decree which had been pronounced. The agreement of October, 1854, stated that *Hudson* had requested the company to vary the terms of the agreement of January, 1854, and referred to some of the particulars as to which the variance was to be made, and it went on thus: "And *thereupon* the company consented that the terms of the said agreement should be varied." That shewed that the October agreement was a new variation from the old liability, an arrangement made upon considerations which then, at that moment, influenced the company, and, consequently, the construction to be put upon it must be confined to the terms, conditions, and rights to be found in that agreement itself. The word used in the proviso there is, that this shall be "without prejudice

to the right of the company to *recover* the whole of the moneys" which the company is entitled "to *recover* in the suits." That is not a mere remitter to the original state of things, but implies a new proceeding before a Court to obtain what the company believed itself entitled to. Surely if *A.* is said to owe *B.* £1000, but *A.* disputes it, and *B.* says to *A.*, "If you will not continue to dispute my claim to that amount, and will pay me £500 and interest on a certain day, I will take that in full satisfaction; but if the money is not paid on that day, I will recover the whole that I claim," that would be a penalty on the non-payment at the day named. Now, here was a dispute as to the amount. That dispute was to be given up, and the amount admitted, and payment of a smaller sum in satisfaction was to be made in a certain way; if not made on that particular day, and in that particular way, the whole amount was to be recovered. That was a penalty on non-performance of the new agreement. As the return to the original claim was to be upon the non-performance of any of the stipulations of the agreement, the settled authorities shew that it was nothing but a penalty. *Kemble* v. *Farren* (1) is a decisive authority on that point, and that case, besides, establishes this proposition, that expressions used by the parties themselves, distinctly declaring the sum to be liquidated damages, and not to be a penalty, cannot make any difference in the legal result. That case followed and worked out the principle declared in *Astley* v. *Weldon* (2), and their authority has never been impeached. In *Betts* v. *Burch* (3) the same rule was held, and Mr. Baron *Bramwell* there explained the principle on which the law proceeded. In all these cases the sum stated was construed to be a penalty, because it might become due not merely on a general and wholesale violation of the terms of the agreement, but on the non-observance of any one of its particular stipulations. That is the case here, and therefore here the proviso must be construed as imposing a penalty. If so, it is admitted that Equity will not enforce it.

The second point here is as to waiver. There is not anything in the original agreement which gives to the Appellants a right to enforce a forfeiture, if the money is not paid or the mortgage given

(1) 6 Bing. 141. (2) 2 Bos. & P. 346.
(3) 4 H. & N. 506.

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upon the very day named. That being so, when the mortgage was given and was accepted, though not on the very day named, the liability to forfeiture was gone—and no mere expression that the agreement was to be "without prejudice" to the previously existing rights of the parties could revive those rights. By one of the stipulations *Hudson* was bound to give a mortgage; he gave it, and it was accepted. By accepting it the objection that it was not given at the time stipulated was waived, the indenture of February, 1854, expressly reciting that "in pursuance and part performance of the hereinbefore recited agreement of January," the mortgage had been made. This was an acknowledgment of performance, and any right of the Appellants founded upon non-performance was at an end.

The deed of October is that which really governs the relations between these parties. That deed, and the payment of £33,000 which it acknowledges, constitute a complete performance of the deed of compromise. There is nothing in that deed which makes time of the essence of the contract. It is a rule of Equity that it cannot be so unless it is so expressly stipulated or is necessarily implied. It is not so here. The case of *Ford* v. *Chesterfield* (1) is distinguishable from the present. There the debt due was due on a mortgage; and though there was an arrangement to take a smaller sum if paid on a given day, yet there was no other stipulation which affected the right to demand the whole of the original mortgage debt if there should be default made in payment of the lesser sum. There are several matters here which do affect the right to the original demand, and some of the conditions on which the smaller sum was agreed to be accepted have been performed. The Appellants here have taken a collateral security, not for the whole of the sum which was at first due, but for that which was due under the agreement. Then no failure in the exact performance of other parts of it, which were trifling in comparative importance, could entitle the Appellants to fall back on what was, or, at least, must be treated in Equity as, really a penalty for non-performance of the whole. There was one provision of the agreement which shewed that the Appellants did not contemplate actual payment of the whole sum as an eventual or necessary part of the

(1) 19 Beav. 428.

transactions. There was a covenant for the payment of instalments. If there was a failure in the payment of the instalments, interest at the rate of 4 per cent. was to be paid; but there was no covenant that thereon the whole should at once become recoverable. Then, again, the deed contains, on default in the payment of the sums agreed on, a power of sale, as to which, however, it is expressly stipulated, not that the whole agreement shall fail, but that, in the first place, the Appellants shall pay and reimburse themselves; in the next, discharge certain claims of other persons; and, lastly, pay any surplus to *Hudson's* trustees of the real estate, or to *Hudson* himself. This shews that the mortgage itself was only to operate as a collateral security for the amount secured by the deed under the provisions of which it was given. There could, under these circumstances, be no reverter to the original right; but if such a reverter could arise, it would bear the character of a penalty, and could not be enforced in Equity. The covenant for payment of the smaller sums was, under the terms of the deeds, to amount to a full discharge.

Sir *R. Palmer*, Q.C., replied.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, in this case the attention of the House has been called to an Order of the Master of the Rolls, made upon summons at Chambers, with reference to an account which has been directed of what is due to the Appellants upon certain securities obtained by them from Mr. *Hudson* in respect of three several sums of money, one of which had been ascertained and recovered by the decree of the Court, and the other two of which were the result of accounts in respect of which two other suits were pending at the time of the agreement, which I have afterwards to refer to, being made. And the question being, whether or not the Appellants are bound to accept under agreements a lesser sum than that which on the whole was due to them, we are asked by the Appellants to reverse the Order of the Master of the Rolls, by which he has ordered that in taking a certain account directed by the decree in the causes, they shall be held to have agreed and to have bound themselves to accept the lesser sum.

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In this case the Order of the Master of the Rolls was appealed from, and the Court of Appeal heard the cause, which was brought on before the then Lord Chancellor and the Lord Justice *Turner*, and their Lordships having differed in their view of the case, the decree of the Master of the Rolls thereby became affirmed.

The matter turns entirely, as it seems to me, upon the proper construction of the several agreements which have been entered into between the companies represented by the Appellants and Mr. *Hudson*. Those agreements were principally, so far as they were committed to writing, these:—The first was an agreement which was entered into in January 1854, an instrument executed in pursuance of that agreement in February, 1854, and other instruments which were executed consequent on that agreement, rather than in pursuance of it, in the month of October, 1854. There is an intermediate stage in which it is said that there was an agreement entered into by parol, in or about the month of August of the same year 1854, upon which I shall presently say something more.

The position in which Mr. *Hudson* and the Appellants found themselves at the date of the agreement of January 1854, was this:—The Appellants had obtained in one of the three suits which had been pending against *Hudson* a final decree, by which a sum something over £54,000 had been found due to them. There were two other suits pending between them and *Hudson*, in which decrees had been made for an account, but that account had not been taken or ascertained—that is, the amount to be found due had not been reported by the Chief Clerk—and there had, therefore, been no final decree in those two causes. In that state of things, the decree in which the £54,000 had been found due was a decree which also directed that a part of that sum, a large sum of money, I think £20,000, should be paid at a given time. It is not necessary to enter into more detail on that subject than simply to say that it was to be paid at a given time.

When that time arrived *Hudson* was not prepared to pay it, and accordingly, the time having elapsed, and farther time which had been conceded (the time having been extended by consent) having also elapsed, the parties were in this position, that *Hudson* was obliged to ask for farther indulgence. This was granted; and an agreement was entered into evidencing the arrangement made

between the parties in respect of which farther indulgence should be conceded. The terms insisted upon on behalf of the company were:—that as regarded the two decrees in the suits in which there had not yet been a final account, those accounts should be at once adjusted; that the amount claimed to be due to the company should be agreed to by *Hudson*; and that he should also engage not to present any appeal in respect either of the decree under which the amount had been ascertained, or in respect of the other two suits in which he now consented that decrees should be made for the sums claimed by the Appellants. Besides that, *Hudson* was to make certain arrangements with reference to the payment of the money which the Appellants claimed to be due. And if those arrangements were made, the Appellants then entered into an engagement that they would accept £51,000 in full satisfaction of their whole demand. But that was to be only on condition of the engagements being fulfilled by which the sum of £51,000 was to be provided for.

Those engagements are contained in the agreement of January, 1854, and they are of this character—that inasmuch as an arrangement had been made for the sale of a large amount of *Hudson's* property to Lord *Downe*, which sale was intended then to be completed on the 6th of April, *Hudson* was, out of the purchase-money to be received from Lord *Downe*, to pay £20,000, part of the £51,000, and to pay also a sum of £1000, which was in respect of costs, the rest, the £50,000, being taken in respect of the debt itself. Besides that, *Hudson* was to execute a mortgage by a given day, by which the rest of the debt should be secured to the Appellants, and the mortgage was to be a first mortgage upon the property which he was so to pledge to them as a security for payment.

Those arrangements having been entered into by the first three conditions of the agreement, the fourth was in these terms:—"The entering into this agreement, and the acceptance by the Plaintiffs of its provisions, in no way to prejudice their existing lien on the estates of the Defendant, nor the different proceedings in the suits, nor their right to continue the same until the total amount herein agreed to be accepted from the Defendant shall be wholly discharged." With reference to that provision, it appears to me that the construction which has been put upon it by Lord Justice

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Turner (a construction, I think, in other respects not disputed in the general argument of the case) is the correct one, namely, that this fourth clause keeps on foot the decrees that had been obtained, which decrees had been registered by the Appellants. It keeps on foot, too, the lien which they had established by registering the decrees for the purpose, so far as that fourth clause is concerned, of securing the full and complete performance of the agreement now in question. It appears to be confined to that particular object.

And then, by the last provision of the agreement, it is thus provided:—"In case Lord *Downe*, or the Defendant, shall not pay and secure the said sums to the Plaintiffs in manner aforesaid, or if a good and satisfactory mortgage shall not be executed to the Plaintiffs for the said sum of £25,613 15*s.* and interest, or if the said Defendant shall fail in performing all or any of the stipulations on his part hereinbefore contained, then the Plaintiffs shall be at full liberty to recover the said principal sums, interest, and costs, decreed or claimed to be due to them in the said several suits, and to adopt all such proceedings in the said several suits or otherwise for aiding their recovery of their said claims as they may be advised."

That is a clear and distinct provision that upon failure of compliance on the part of *Hudson* with the arrangements in respect of which the indulgence was to be granted to him, all the rights of the Appellants were to revive, to the full amount of the several sums found due, or claimed by them and admitted by the Defendant to be due.

This appears to me to be the proper place for observing in what manner the law would be applicable to an agreement of this character. Now, in this respect I have the satisfaction (and I deem it a great satisfaction) of saying, that I in no respect differ from my noble and learned friend, who, as Lord Chancellor, came to the conclusion that the decree of the Master of the Rolls should be upheld. I in no degree differ from his statement of the law as applicable to cases of this description. Indeed, as my noble and learned friend in giving judgment in the Court below said, as far as regards this particular agreement, had the case rested there, upon the failure of compliance by *Hudson* with the stipulations contained in the agreement, the rights of the Appellants would have revived, and they would have been entitled to the full amount

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of their claim with reference to the sums established to be due in the one suit, and agreed and admitted to be due in the other suits. I take the law to be perfectly clear upon these matters which we have to consider with reference to this and the subsequent agreements, namely, that where there is a debt actually due, and in respect of that debt a security is given, be it by way of mortgage or be it by way of stipulation that in case of its not being paid at the time appointed a larger sum shall become payable, and be paid, in either of those cases Equity regards the security that has been given as a mere pledge for the debt, and it will not allow either a forfeiture of the property pledged, or any augmentation of the debt as a penal provision, on the ground that Equity regards the contemplated forfeiture which might take place at Law with reference to the estate as in the nature of a penal provision, against which Equity will relieve when the object in view, namely, the securing of the debt, is attained, and regarding also the stipulation for the payment of a larger sum of money, if the sum be not paid at the time it is due, as a penalty and a forfeiture against which Equity will relieve.

Now, that being clear on the one hand, it is equally clear on the other that where there is a debt due, and an agreement is entered into at the time of that debt having become due and not being paid, in regard to farther indulgence to be conceded to the debtor, or farther time to be accorded to him for the payment of the debt, or in regard to his paying it immediately, if that be a portion of the stipulations of the agreement, or at some future time which may be named, and the creditor is willing to allow him certain advantages and deductions from that debt, as well as to extend the time for its payment, if adequate and proper security in the mind of the creditor be afforded him as his part of the bargain in respect of which he is to make these concessions, then it is perfectly competent to the creditor to say: "If the payment be not made *modo et forma* as I have stipulated, then forthwith the right to the original debt reverts, and it is to be open to me to proceed with reference to the original debt, and to exercise all those powers which I possess for compelling payment of the original debt; in other words, I am entitled to be replaced in the position in which I was when this agreement, which has been now

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broken, was entered into." Therefore, as far as the law of the case is concerned, there can be really no difficulty in the matter which we have to consider, the sole difficulty being, to ascertain what is the proper construction to be placed upon these various instruments.

Now, my Lords, as regards this first instrument, as I have already said, I do not find that there exists any difference of opinion between my noble and learned friend and myself as to the construction to be placed upon it, namely, that on a breach of any of the engagements entered into by *Hudson* with reference to this first agreement, the creditor should be at liberty to pursue all those remedies which he had for the recovery of the original debt to its full amount.

That being so with regard to this first agreement, what next takes place is this. The mortgage which was to have been given was not given on the day which was originally contemplated, but two days afterwards. It was to have been given on the 14th of February, and it was not given until the 16th of February. And it turned out afterwards that *Hudson* not being able to clear off the incumbrances which affected the property so mortgaged, it could not be a first mortgage. On the 16th of February the mortgage was executed. And one of the arguments which has been urged before us by the counsel for the Respondents has been this (and the same argument was urged in the Court below), namely, that by the waiver of the non-compliance with one of the conditions of the agreement, namely, the waiver of the non-compliance with the condition that the security should be given on the 14th of February, by the acceptance of the mortgage on the 16th, the whole of the engagements which Mr. *Hudson* had entered into were waived (for that really is what the contention amounts to), and that it was impossible, after that, to revive the debt which originally existed, and in respect of which the benefit of all the securities is reserved on failure of compliance with the conditions.

I confess it seems to me to be an extremely strange contest on the part of the Respondents, when it is attempted by them to say that one out of these numerous engagements which Mr. *Hudson* had entered into not being performed to the day, and an indulgence being given to him to the extent of a few days (or it

might be a month, for it is not very material to consider the amount of time which was given), but farther time being given to him in respect of the performance of one of these conditions, that thereupon there was a complete waiver of the whole of the other stipulations which he had entered into. It is not like the case of a condition, which being whole, complete, and entire, if once waived is waived once and for all, but it is simply (as Lord Justice *Turner* put it) that, upon one of the conditions being broken a concession is made in respect of that one condition, with regard to which the Appellants could never again insist upon their complete right; but as regards all the other conditions of the agreement they remain in full force and validity, and all have to be performed. And the breach having taken place not only in respect of the few days elapsing beyond the time when the mortgage was to have been given, but in respect also of the security for the payment of the money being a first security and a first mortgage, and in respect farther, as it afterwards appeared (not, of course, in February, because the time had not then arrived for the payment of the moneys from Lord *Downe*), of the payment on the 6th of April of the moneys which were to be received from the mortgage on Lord *Downe's* purchases, it appears to me plain and clear that, under the agreement of January at least, the rights of the Appellants remained exactly in the position in which they would have been if the mortgage in question had been executed on the 14th instead of the 16th of February. I ought also to observe that in the deed of the 16th of February exactly the same provision is contained, namely, that, on default, all the rights and remedies of the Appellants should be reserved. I do not think it at all a material point in the case; but I may just remark, in passing, that it shews, amongst other evidences to the same effect, the anxious care of the Appellants at all events, in every step of the transaction, to preserve their original debt in the event of the terms upon which they granted the indulgence not being fully complied with.

Then, my Lords, the next transaction is the one which is said to have taken place in August, of which we find the first trace in the statement contained in the bill of the present Appellants. It is in the 9th paragraph of their bill, and it is thus stated:—"In the

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month of August, 1854, *George Hudson* requested the *North Eastern Railway Company* to vary the terms of the agreement of the 30th day of January, 1854, and the company consented to such variance, and it was accordingly agreed between them (but without prejudice to the right of the company to recover the whole of the moneys ordered to be paid to them by the final decree in the secondly thereinbefore-mentioned suit, and the whole of the moneys which the company were entitled to recover in the firstly and thirdly thereinbefore-mentioned suits, and the consent to final decrees contained in the agreement of the 30th day of January, 1854, in case the principal and interest to be secured by the indenture of the 21st day of October, 1854, hereinbefore stated, or any part or parts thereof, were not duly paid on the respective days by such indenture appointed for payment thereof): First, that the company should receive the sum of £33,000 instead of the sums of £20,000, and £1000, out of the said *Viscount Downe's* purchase-money," and so on. Then the statement proceeds to give the various terms of the engagement which was contemplated in August, and was perfected at some future time; we need not at this moment say at what future time.

Now, assuming this to be the agreement which was to be perfected on the next day, the 31st of August, or the beginning of September, or any time that may have been thought right before the month of October, the question then is: What is the effect of this statement? And here it is that I confess I cannot concur in the view taken by my noble and learned friend in the Court below as to the effect of this statement. I quite agree with him that the reservation contained in the expression that a new arrangement would be entered into "without prejudice," cannot confer any new right on the parties who save to themselves an existing right by those words, but do not enter into any engagement or stipulation with regard to a new right. But it appears to me that in reading this very long parenthesis we must read it (to make it more clear) in this way, namely, as if in truth the words which occur at the end of the parenthesis and which tend to confuse the meaning, namely, the words "in case the principal and interest to be secured by the indenture of the 21st day of

October, 1854, hereinafter stated, or any part or parts thereof, were not duly paid on the respective days by such indenture appointed for payment thereof," had occurred at the beginning instead of at the end of the parenthesis. I will explain in a moment what it is that I mean by making that transfer. What I take to be the true intent and meaning of the parties here is this—not to create any new right, but to say: "We will grant you an extended time, but that extended time, which we intend to grant you, shall not prejudice our still holding on to our right in respect of the original decrees, in case of the new agreement being broken as the former one already has been. We will therefore do this: We will give you the farther time which you require, but in doing so, we say that it shall be without prejudice to our rights which now exist: we have those rights now. You have broken the first agreement. The time has passed. The money has not been paid by Lord *Downe*, and you have not given us a first mortgage. In all those respects you are in default, we have the right, and that right we intend to insist upon, and this new arrangement which we are about to make shall be without prejudice to that right, and the arrangement shall be this: The extended time which we mean to give shall be provided for by the arrangements which we will hereafter make, but you shall not, when that time has elapsed, be at all in a better position than that in which you are at the present moment." But that which has confused the arrangement is this: They commence it by saying, without prejudice to our right to recover, upon non-payment at a date which has not yet arrived. Therefore, it is said, of course they cannot be speaking of an existing right. It would appear from the manner in which this phraseology is introduced, that whilst speaking of an existing right, they seem, towards the close of the sentence, to be speaking of some new right which is to accrue to them on a new default. I apprehend that that is not really or in any way the meaning of the sentence. The meaning of the sentence is to be construed exactly as if those words had come at the first part of it instead of at the last, which would make it run in this way: That in case the principal and interest to be secured by what we are about to do, and the instrument we are about to execute, be not paid, still there shall then be no prejudice to our rights which we have at the

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present moment. And the language used is perfectly consistent with that meaning being put upon it, even if we take the sentence as it stands, and read the words as they are at present placed. It means the same thing, but expresses the meaning less clearly than it would have done if those latter words had been placed in the previous part of the sentence. If you read the words either in the one place or the other, the meaning comes out equally satisfactorily, but at the same time I think it would have been somewhat more clearly brought out, and made more intelligible, if those words had been put at the beginning instead of at the close of the sentence, and if they had said: "We are about to enter into new engagements and stipulations, but in case those engagements and stipulations should be broken, then we reserve all our old rights which now exist—those rights still belong to us—we have never let go our hold and grasp upon those rights, and we never intend to do so until you faithfully perform the contract which you are entering into with us. We previously entered into one engagement with you, but you have not been able to keep it, therefore our rights are now the same as if that engagement had never been entered into; we will now enter into a new engagement, we will allow a certain variation of the terms of the agreement which we have already entered into; we are willing to do that, and that variation shall take place in the manner that we are about to arrange; but remember, if that engagement also be broken, then again will revive all those rights which subsisted in us at the date of the agreement."

I think, in that point of view, it is quite immaterial whether or not this engagement was entered into in August or at a later date. If it was entered into in August, it was, at all events, to be completed by an agreement which was afterwards to be reduced into writing. That was contemplated by everybody; and all that the pleader is telling you here (for it is to be observed that I am now only dealing with the pleader's language, and not with the language of the instrument) is this. An agreement was entered into, which was to be reduced into writing afterwards to express more clearly the intention of the parties, by which farther arrangements were made, and certain farther indulgence was granted—but with an express proviso that that farther indulgence should not preju-

dice any of the rights existing in the Appellants at the time of entering into that agreement in August, even supposing that the terms embodied in that farther arrangement were again departed from, as Mr. *Hudson* had already departed from his previous engagement.

Now when we get to the recital in the deed of October itself, we have not exactly the same sort of clumsiness of expression, and although there is there also a very long parenthesis, yet the matter is somewhat more precisely and clearly stated than it is by the pleader in the passage which I have read from the bill. In the deed of the 21st of October, 1854, the recitals are these: "And whereas the hereinbefore recited sale to the said Lord Viscount *Downe* of the said *Newby Park* estate, and the chattels and effects thereon, has not yet been completed" (which ought to have been completed in April), "And whereas shortly previous to the execution of these presents *George Hudson* applied to and requested the *North Eastern Railway Company* to vary the terms of the agreement of the 30th day of January last, in order to enable him out of the purchase-money payable by the Lord Viscount *Downe* to pay and discharge the claims of the several persons (other than the *North Eastern Railway Company*) having charges, liens, or claims upon the estate and premises contracted to be sold to the Lord Viscount *Downe*, and upon the hereditaments and premises at *Whitby*," whereof a first mortgage had been agreed to be granted by the articles of the 30th of January, 1854: Then it says, "And the *North Eastern Railway Company* upon such application and request thereupon consented that the terms of arrangement and compromise which had been previously agreed upon, and which are contained in the hereinbefore recited articles of agreement of the 30th day of January, 1854, should (but nevertheless without prejudice to the right of the company to recover the whole of the moneys ordered to be paid to them by the final decree in the secondly hereinbefore mentioned suit, and the whole of the moneys which the company are entitled to recover in the firstly and thirdly hereinbefore mentioned suits, and the consent to final decrees therein contained in the hereinbefore recited agreement of the 30th day of January last, in case the principal sum and interest hereinafter secured, or any part or parts thereof,

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are not duly paid on the respective days hereinafter appointed for payment thereof) be varied in the following particulars."

Now, there the agreement is stated to have been shortly before the execution of this indenture. One would infer certainly, as the more natural inference from such a recital contained in an instrument of that kind, that the agreement was that which was to be embodied in the indenture, and that the indenture was merely to be the expression of that which had been previously arranged between the parties immediately anterior to the execution of the instrument. You look at this indenture as that which expounds the agreement come to in August preceding, by giving full and complete expression to that which the pleader imperfectly expressed in the recital as the intention of the parties in August. And then we find that what is agreed to in that long parenthesis is this: We hold on to our claim—we are not creating any new claim or any new right which we had not before; but we hold on to our claim in case this agreement itself should be broken. We do not create for ourselves a new right by means of which, upon the breach of this agreement, there shall arise to us a claim or demand which was gone and past at the time of entering into this arrangement of October; but we simply do that which we did in January, that which we expressed in the mortgage of February, and that which we have frequently stated as our intention. That appears to me to be the substance of it, though I confess it is not very happily arranged as regards the language in which it is expressed. They say: We will do what we can do to accommodate you. We will make arrangements with you with regard to the payment of this money, but what we do insist upon is, that we always will retain our original hold upon our original debt, as the right which we must revert to in case all these attempted agreements prove abortive in consequence of your being unable to fulfil their conditions. I think there is nothing else of any materiality stated in that indenture beyond this; the new arrangements are stated there, but I really need not enter into them. It is unnecessary to enter into the details of those arrangements which have been broken, beyond stating that Mr. *Hudson* was to pay a larger sum of money down than the £21,000, the sum originally stipulated for, out of Lord *Downe's* purchase-money. It was now to

be £33,000 instead of £21,000, and the mortgage to be given would be comparatively reduced in amount, and that mortgage was no longer to be a first mortgage, but the Appellants had agreed to waive their right to its being a first mortgage, and to allow certain other charges of a considerable amount to be created with the view of clearing off certain incumbrances and judgments. Then in the mortgage deed there was contained a power of sale to be exercised in default of the performance of the covenants contained on the part of Mr. *Hudson* for payment, which was in the usual form, the payment being by instalments at dates specified, one at a given date, and the other half a year afterwards. Those two instalments were stipulated to be paid in that way, and in default of payment there is a power of sale which arises under the mortgage. I mention this part of the deed because it was a good deal relied upon by the counsel for the Respondents. They insisted that this power of sale was a power of sale arising upon default, and the trusts of the moneys arising from the sale were to pay, first the lesser sum to the Appellants, which it was to be the privilege of Mr. *Hudson* to pay in the event of his complying with all the terms of the agreement, and then, after paying that lesser sum, to hand over the surplus to some persons who came next as incumbrancers, and then finally to hand over the ultimate surplus to Mr. *Hudson* himself. It was therefore contended that that being so, there could not be any intention of recovering the whole of the debt in the event of default being made, because, said the counsel for the Respondents, you find that default is anticipated, you find that sale is authorized, and you find that provision is made, not for the payment of the larger sum, but of the smaller sum; and after making payment of the smaller sum, you find that the surplus of that which is produced from the sale is to be handed over to Mr. *Hudson*. A similar remark was made upon the recitals in the agreement, namely, that the obligation there was upon Lord *Downe's* payment being made, and upon the mortgage being made. Upon those two conditions being complied with the estate of Mr. *Hudson* was to be released, and it was only upon full and complete payment, on the day, of the sums covenanted to be paid by Mr. *Hudson*, that he was personally to be released, the estates being released upon compliance with the other two provisions.

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But what must govern the rights of the parties is this. In the ultimate provision contained in the indenture, after reciting what had been recited as having been agreed upon as stated by the pleader in August in the agreement a short time anterior to the deed, we find this provision: "Provided always, and it is hereby agreed and declared, that these presents shall not, nor shall anything herein, or in the said hereinbefore recited agreement of the 30th day of January last, or the said recited mortgage security made and executed in pursuance thereof, or in the said hereinbefore recited subsequent arrangements and agreements contained, prejudice or affect the rights and claims of the said *North Eastern Railway Company* under the hereinbefore recited decrees or orders respectively made in the three several hereinbefore mentioned suits, or under any or either of such decrees or orders, or the rights and remedies of the said *North Eastern Railway Company* against the said *George Hudson*, his heirs, executors, administrators, or assigns, under or by virtue of such decrees or orders, or any or either of them, or the rights of the said *North Eastern Railway Company* under or by virtue of the said recited agreement of the 30th day of January last, or otherwise, to call upon the said *George Hudson* to consent to or otherwise obtain a final decree in each of the said suits hereinbefore firstly and thirdly mentioned, for the several sums of money in the said recited agreement of the 30th day of January last mentioned in that behalf, or any other sum or sums of money which may be recoverable in the said last mentioned suits or either of them, or to recover the whole of such several sums of money, and the sums of money, interest, and costs which by the hereinbefore recited final decree, made in the said secondly hereinbefore mentioned suit, were declared due or ordered to be paid to the said *York and North Midland Railway Company*, or prejudice or interfere with any lien or charge which the said *North Eastern Railway Company* shall or may have upon or against the hereditaments and premises hereinbefore respectively expressed to be granted, appointed, demised, and assigned, or upon any other real or personal estate which now or at any time hereafter may belong to the said *George Hudson*, his heirs, executors, administrators, or assigns, or in which he or they may have any beneficial interest, it being the express understanding of all parties to these

presents that the security intended to be hereby given shall be in addition to, and not in any manner in substitution for, the charge or lien which the said *North Eastern Railway Company* may have upon the said hereditaments and premises comprised in these presents, under or by virtue of the said decrees or orders, or any or either of them, and that the said *George Hudson*, his heirs, executors, administrators, or assigns, shall not be at liberty to dispute the right of the said *North Eastern Railway Company* to recover the whole of the principal moneys, interest, and costs which by the said final decree in the said secondly hereinbefore mentioned suit are awarded to the said *York and North Midland Railway Company*, and the whole of the several principal moneys, interest, and costs, mentioned in the said agreement of the 30th day of January last, to be recoverable in the said firstly and thirdly hereinbefore mentioned suits, except on or until full payment by the said *George Hudson*, his executors, administrators, and assigns, on or before but not after the several days hereinbefore appointed for payment thereof of the principal sum and interest hereby secured."

Then the whole arrangement runs thus:—As far as the mortgage is concerned it is prepared in the ordinary form in which a mortgage would be prepared. It is prepared for securing a certain sum of money, which is the lesser sum, and it has the usual provisions which are contained in every mortgage deed, and among them a power of sale. It is provided that upon default in the payment of the mortgage debt and interest there mentioned there shall be a sale; and then, after sale, there shall be payment of the money to the mortgagee, and afterwards to the incumbrancers claiming under the mortgagor, when the moneys secured under that mortgage are paid. That is not in any way inconsistent with the provision in the deed, which is this:—If, after all, this mortgage being made, and these moneys being secured, the whole debt be not satisfactorily paid, and everything arranged under this agreement, just as was provided before under the agreement of January, then we are to have full rights and powers of recovering the money in question, except (for that is the mode in which the proviso is expressed here) on the payment of the full moneys due on or before, but not after, the final days appointed for payment.

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Here they have done exactly what it seems to me was stated by the pleader in August.

It does not appear to me, therefore, that under those words "without prejudice" it was intended that any new right whatever should be created; but it was simply intended to preserve the original right. The right originally existed, but the time for reserving that original right was protracted, and some farther time was conceded to the debtor by the arrangement which was entered into.

This last instrument concludes the whole series. It appears to me that neither here, nor in any of the previous arrangements, was there for a single moment any abandonment of the original rights. What they did was this:—They made the several arrangements which have been referred to for the purpose of meeting *Hudson's* necessities. Whether, as has been observed in the Court below, it was a hard bargain, or not a hard bargain, might or might not be the case, but that is not a question which it is necessary for us at all to enter into, though I confess I am not myself able to see any special hardness in the bargain, regard being had to the magnitude of the stake and the difficulties in which *Hudson's* property was placed, and the embarrassments and incumbrances which affected it. But whether it was a hard bargain or not, they made their bargain with him, which he on his part entered into, that under certain conditions he should be entitled to say that a less sum should be received by the Appellants, his creditors, than would otherwise be due to them, but he still remained liable for the original debt if he was not able to fulfil the arrangement by the payment of that lesser sum. There is no penalty, no forfeiture, nothing of the kind, but simply a provision that upon the terms upon which the indulgence is granted not being complied with, the original rights shall be preserved, and that the creditors shall be entitled to avail themselves of those rights.

My Lords, I do not enter into some of the other arguments which have been adduced before us on the part of the Respondents' counsel, by whom the case was exceedingly ably argued, and I may say that we are especially indebted to Mr. *Jackson* for his argument, which put the case very plainly before us from his point of view. But it appeared to me that the whole of his argument turned in truth upon this, that there was not contained in the

original agreement any right to insist upon forfeiture in the event of non-payment on the day to be reserved by the mortgage which was to be executed in February; that after the execution of the agreement in January, and the execution of that mortgage two days later than the time specified in the agreement of January, there was not any longer a right existing in the company, but that that right must be considered to have ceased at the time of the engagement being entered into in August, and that the expression "without prejudice" would not revive any right, if that right had determined. I should have been quite willing to follow his argument if I found that the conclusion to be derived from the instruments themselves warranted me in doing so; but I cannot find anything to warrant me in coming to the conclusion that, at any period whatever, the right claimed by and vested in the Appellants of recovering their original debt had been waived or abandoned. And, under these circumstances, it appears to me that I am bound to advise your Lordships that the original order of the Master of the Rolls made in this case should be reversed.

LORD WESTBURY:—

My Lords, at the request of my noble and learned friend on my right (1), I, next, proceed to address a few words to your Lordships. I am sure your Lordships will agree with me that the Appellants have been very unfortunate in this litigation. In answer to the questions which they were required to answer in the Chamber of the Master of the Rolls, they thought that it was very rational and very right for a creditor to say to his debtor, "Provided you pay me half of the debt or two-thirds of the debt on an appointed day I will release you from the rest, and will accept the money so paid in discharge of the whole debt; but if you do not make payment of it on that day, then the whole debt shall remain due to me, and I shall be at liberty to recover it." If you were to put that proposition to any plain man walking the streets of *London*, there could be no doubt at all that he would say that it is reasonable and accordant with common sense. But if he was told that it would be requisite to go to three tribunals before you could get that plain principle and conclusion of common sense accepted as

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law, he would undoubtedly hold up his hands with astonishment at the state of the law.

The Master of the Rolls appears to have thought that the residue of the debt in the case I have put would be converted into a penalty, and that the penalty could not be enforced. It is impossible to hold that money due by contract can be converted into a penalty. A penalty is a punishment, an infliction, for not doing, or for doing something; but if a man submits to receive, at a future time and on the default of his debtor, that which he is now entitled to receive, it is impossible to understand how that can be regarded as a penalty. I have not therefore the least hesitation in stating that (if the Master of the Rolls is rightly reported), it could not have been present to him at the moment when he delivered his judgment, that the rest of the debt still remained due by contract, and that what was due by contract could not be a penalty.

Now the proposition of the Master of the Rolls was entirely negatived by my noble and learned friend near me (Lord *Chelmsford*) in his judgment, because he stated most distinctly that in the case put by the Master of the Rolls the creditor would be remitted to his original claim. My noble and learned friend, however, appears to have been induced by what he heard in argument, to suppose that there had been an antecedent agreement completed and concluded, and standing independently by itself, prior to the deed of October, 1854, and that by that antecedent agreement the creditor had finally engaged to take a part in discharge of the whole. It is plain enough that if part of a debt has been duly and unconditionally remitted, the part so unconditionally remitted ceases. If it be revived it becomes a subject in respect of which there is no longer any contract in existence, and which therefore may properly be regarded as a penalty.

But when we come to examine the facts in this case, it is clear, notwithstanding what was stated in the argument, that there never was any concluded agreement between these two parties on the subject of this debt, except the agreement of January, 1854, and the agreement which is contained in and carried into effect by the instrument of October, 1854. But, my Lords, it is quite immaterial to deal with the argument which has

been addressed to your Lordships with regard to the agreement of January, 1854, because it is clear to all who will attend to the deed of October, 1854, that both the contracting parties at the date of that deed admitted that the original debt still remained due, and the whole deed is framed upon that basis and understanding. It is idle to suppose that there was any intermediate agreement in August, because the deed plainly treats the agreement or treaty of August as the thing that was to be carried into effect by the deed of October, 1854. And accordingly, in the recital contained in the deed of October, 1854, it is stated that Mr. *Hudson* had applied to the company to vary the terms of the agreement of the 30th of January. And then it goes on to state that they have agreed to vary those terms, and to make a new agreement between the parties, the Appellants receiving the minor sum of money, but with this restriction, that in case the principal sum and interest hereinafter secured, or any part or parts thereof, are not duly paid on the respective days hereinafter appointed (that is, appointed in this deed) for the payment thereof; the entire debt is to be paid. The whole debt is by this recital plainly treated as an existing debt due to the Appellants; and the agreement is to take the mortgage and part of the debt as a satisfaction of the entire debt; but on the terms which I have read, provided that if the principal sum and interest hereinafter secured are not duly paid on the day hereinafter appointed for the payment hereof, the entire debt is to be paid.

Now, that being clearly the agreement between the parties, we are told distinctly that the whole of the securities are made available for that debt. The proposition is to alter the terms of the antecedent agreement, and to substitute for them, or for that portion of them which was not carried into effect (for part had been performed), the terms which are here stated, namely, the acceptance of the lesser sum and the security for that lesser sum, subject to the proviso that it shall be paid on the days hereinafter appointed, otherwise the entire sum is to be paid.

Now, upon this there was a very ingenious argument addressed by the Counsel for the Respondents. He put the law thus: If (he said) the larger debt is to arise on the breach of several stipulations, and one of those stipulations may be the default of the

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debtor in a minor and immaterial point, then the entire debt arising upon such trifling default must assume, in the eye of the law, the character of a penalty and not of a debt. And in support of that proposition the well-known case of *Kemble* v. *Farren* (1) was cited. The case of *Kemble* v. *Farren* was an attempt on the part of certain contracting parties to escape from the well-known law on the subject of penalty, by giving to a penal sum, agreed on by contract, the character of liquidated damages, and the whole question was, whether that attempt to make the damages a sum of money ascertained by the agreement of the parties, could or could not be effected. The answer that was given by the Court of Common Pleas was, why if the sum described as liquidated damages be a large sum, and the title to that sum is to arise upon some very trifling consideration, then it follows plainly that the large sum named never could have been meant to be the real measure of damages. It was an oppressive agreement, the sum named never could have been the proper amount of damages arising upon the non-observance of some of the stipulations of that agreement, which probably would have been measured by a few shillings, and therefore the very large sum stated to be damages was properly regarded as in the nature of a penalty. But the penalty and the liquidated damages in that case were not an antecedent debt due upon a contract for valuable consideration, but were a conventional sum put in by the parties, plainly for the purpose of securing the performance of the agreement contained in the engagement between them. There is, therefore, nothing at all corresponding to the case where a creditor says to his debtor, "If you pay me punctually on a given day a smaller sum of money I will take it in discharge of the whole, but if you fail in doing so my title to the original debt shall in no respect be prejudiced by this agreement."

Another very ingenious argument was urged on your Lordships' attention by the junior counsel for the Respondents, who very properly admitted what is the plain truth of the case—that the whole of the relation between the Respondents and the Appellants is to be collected in law from the final instrument, namely, this deed of October, 1854, and that all that previously existed, all that was

(1) 6 Bing. 141.

treated of or agreed on, was merged in the stipulations contained in that final agreement. But he endeavoured to shew that time was not of the essence of the contract contained in that agreement. Now, if it be possible, as it plainly is, to make time of the essence of a contract touching the performance of a thing agreed upon, or the payment of money, I think it is impossible to imagine anything more distinctly and lucidly stipulated for than that time should be of the essence of the performance of this contract touching the payment of the smaller sum of money. Indeed, as I stated in the course of the argument, the conveyancer seems to have ransacked the English language for clear expressions to denote that the parties placed themselves in this relation. "Give me the money on the day named, and I give you a release. But if you do not give me the money on the day named, then our antecedent relations as creditor and debtor shall remain unaffected." And, therefore, when he says the money shall be paid on that day he is not content with that, but he says, "Pay it on and not after that date." It is quite plain, therefore, that if language could ever make time of the essence of a contract we have that language in this instrument we have to construe.

My Lords, I think it is, therefore, very clear what the answer is that ought to have been given to the question put at Chambers —whether the accounts ought to be taken on the footing that the company was bound to accept this lesser sum. The answer to it must be in the declaration of this House, embodied in its order: —Declare that the Appellants (who represent the *North Eastern Railway Company*) are not bound to accept these sums in full satisfaction of all their claims under the decrees. And I submit to your Lordships that this should be the declaration in the order that is now to proceed from your Lordships, and I trust that the Appellants, and, indeed, both parties, having found that continued litigation is not merely suffering to one but also to the other, will be more successful in conducting what they have still to do in respect of these matters to a final termination.

LORD COLONSAY:—

My Lords, I concur in the result of the opinions that have been delivered. I think that this case is sufficiently clear, even if we

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should confine our attention to the deed of the 21st of October. It appears to me that the judgment of the Master of the Rolls has proceeded on the principle of construction applicable to ordinary deeds of mortgage, where, under a similar arrangement of words, the payment of a larger sum, which was not the original or actual debt, in default of payment of a smaller sum, which was the true debt, is to be regarded as a matter of penalty, and not as a stipulation that can be enforced. In applying that principle to the present case, I think his Lordship must have declined to look at, or attach importance to, the previous history of the debt, as collected from the various deeds, or even as set forth in that of the 21st of October, 1854. But when we look to the narrative of that deed, which, according to the known rules of construction, may be looked into as shewing the considerations that were influencing the parties, I think it is very clear that this transaction originated out of a position of matters which involved a large liability on the part of Mr. *Hudson*, and a right, as creditors, on the part of the company, established by the decree, which gave them certain rights against his property. And the whole course of proceeding afterwards was not with a view merely of compelling the payment of the smaller sum, but also with the view of releasing Mr. *Hudson* from the payment of a larger debt, but only upon certain conditions. Then, if that be so, I think we must read the whole of this deed, confirmed, as I think it is, by a reference to the antecedent deeds, as a matter of arrangement, with the view of giving Mr. *Hudson* relief if he does certain things, but not otherwise.

I see no ground on which the judgment complained of could be sustained, unless it be the ground which appears to have been taken by my noble and learned friend opposite (Lord *Chelmsford*), in the Court in which the order appealed from was made, namely, that, in the course of these proceedings and arrangements between the parties, something was done which put an end to the original agreement of January and placed matters in this position—that Mr. *Hudson*, being now wholly relieved from the previous debt comes under a new class of obligations with reference only to the payment of a smaller debt. And that again is made to depend upon an arrangement said to have been entered into in the month of August. We have no deed of that date, but it is said that it is

unnecessary to produce a deed because we have the admission of the parties on the pleadings that such an agreement was entered into. We have a brief statement of it in the pleadings. But we have it introduced, where it is important to look for it, in the deed of October. And what is this agreement which is there said to have been entered into? It is represented as a contract by which certain conditions were arranged between the parties, not now alleged to have been in any previous deed, but which are set forth in this deed of October, to the extent to which either party founding on the alleged agreement of August is entitled to claim. I apprehend that neither party can be entitled to found upon that agreement of August as having comprehended anything which is not set forth in that deed of October.

Now I think when you read the recital in the deed of October, it is plain on the face of it that there was, in that arrangement of August, a condition which was substantially a reservation or continuance of that which was in the arrangement of January, and is again repeated more fully at the conclusion of the deed of October. I therefore find no evidence to support the proposition that the original agreement of January was infringed upon or varied, except to the effect mentioned in the deed of October. That being so, I think we are brought to look at the original position of the parties; and the question comes to be, whether when a stipulation is made by a creditor that he will accept a sum smaller than the amount of the debt, and certain securities for that smaller sum, provided the payment is made within a definite time, but that if the payment is not made within that definite time the right which he possesses, and which is treated throughout the deed of October as a present existing right, shall be open to be enforced by him, that is to be regarded as a penalty. I cannot understand that it is to be regarded as a penalty? It is a reservation of an existing right. It is not the emergence of a right that never had any existence at all except on the violation of the agreement which was made. It is merely the reservation of what is the just and honest right of the party, which he was willing to waive to a certain extent, provided his debtor would do certain things, but if the debtor fails in doing those things, then that right which belongs to the creditor shall continue to belong to him, and he

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may enforce it. That being the view I take of the case, I am under the necessity of coming to the conclusion that the judgments appealed against ought to be reversed.

I have, with some labour, gone through all these voluminous deeds and pleadings, but the last deed of October contains, I think, the whole of the materials to which it is necessary to refer in order to arrive at a just conclusion as to what the decision ought to be in this case. I was a good deal moved at the last sitting, especially by the argument that was submitted to us by the concluding counsel for the Respondents. He endeavoured, by a careful analysis, to make it appear that upon the true construction of all the agreements between the parties it never was intended by them that this right should be enforced, and particularly that under the clause in the mortgage it was plain that the matter was to be dealt with differently when the money was recovered under power of sale. But that is an ordinary mortgage clause, and, at all events, it cannot render nugatory the reservation clearly expressed in the conclusion of the deed that the full rights of the parties shall be reserved. Upon the whole, I am of opinion that the judgment of the Court below ought to be reversed.

Orders appealed from discharged, with a declaration that, in taking the accounts, the North Eastern Railway Company is not bound to accept the sums of, &c. [*the smaller sums*], *with interest thereon, in full satisfaction of the claims in the bill mentioned; and with directions that the costs of the Appellants in this appeal, and in the Court of the Master of the Rolls and the Court of Appeal in Chancery, be added to their securities.*

Lords' Journals, 4th March, 1869.

Solicitors for the Appellants: *Williamson, Hill, & Co.*
Solicitors for the Respondents: *Elmslie, Forsyth, & Sedgwick.*

MICHAEL PAKENHAM EDGEWORTH . . APPELLANT;

AND

ANTONIO ERROLES EDGEWORTH . . . RESPONDENT.

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March 9.

Will—Limitation—Condition.

Where an estate has been plainly given in a will, it is not, from the use of subsequent words, to be treated as given upon a condition, if those subsequent words are capable of being interpreted, not as a condition imposed, but as a mere description of the event on which the gift is to come into existence.

W. devised to his brother *C.* for life, and in default of *C.* having issue living at the time of his death to his next brother *F. B.* for life, and in default of *F. B.* having issue living at the time of his death, to his youngest brother *P.* in fee. The testator then described how *C.*'s children should take (namely, in tail male), and went on thus: "And in case *F. B. should come to the possession* of the said estate hereinbefore limited to him, and should die leaving issue, said issue to take in like manner" as before limited to the issue of *C.* *F. B.* died in the lifetime of *C.*, leaving a son. *C.* died some years afterwards:—

Held, that the words "should come to the possession" did not constitute a condition which, not having happened, prevented *F. B.*'s son from taking under the will, and so created an intestacy, but that he took under the force of the limitation created in favour of his father.

THIS was an appeal against a decree made by the Lord Chancellor of *Ireland* on a question of the construction of the will of *William Edgeworth*, deceased. The testator was seised in fee of certain lands called the *Lisduff* estate. On the 20th of November, 1827, he made his will, by which he devised *Lisduff* as follows:—"Unto my brother *Charles Sneyd Edgeworth* for life, and in default of his having issue living at the time of his death, to my younger brother *Francis Beaufort Edgeworth* for life, and in default of his having issue living at the time of his death, to his younger brother *Michael Pakenham Edgeworth*, and his heirs for ever; but in case the said *Charles Sneyd Edgeworth* should die leaving issue, my intention is that such issue, if a son, should take the same estate to him and his heirs, and if more than one son then to the eldest; but if such issue should be a daughter, then to her and her heirs, and if more than one, then to them and their heirs, as tenants in common, and not as joint tenants. And in case the said *Francis*

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Beaufort Edgeworth should come to the possession of the said estate hereinbefore limited to him, and should die leaving issue, the said issue to take in like manner life estates as hereinbefore limited to the issue of the said *Charles Sneyd Edgeworth*." The testator died in May, 1829, leaving *Charles Sneyd Edgeworth* (who was his heir-at-law as well as first devisee), *Francis Beaufort Edgeworth*, and *Michael Pakenham Edgeworth* (the Appellant), him surviving. *Charles Sneyd Edgeworth* entered into possession of the estate, and while he was still in possession—namely, in October, 1846—his younger brother *Francis Beaufort Edgeworth* died, leaving a son, who died in 1863, leaving a son *Antonio Erroles Edgeworth* (the Respondent). *Charles Sneyd Edgeworth* died on the 31st of March, 1864, without issue, having made a will by which he devised all his real estates to his youngest brother, the Appellant. The question then arose whether on the will of *William Edgeworth*, the testator, this estate of *Lisduff* descended to the Respondent, the heir of *Francis Beaufort*, or went, under the will of *Charles Sneyd Edgeworth*, to the Appellant. *Michael Pakenham Edgeworth* filed his Cause Petition in the Court of Chancery, praying for the Order of the Court in the said matter, and on the 27th of November, 1866, the Court pronounced a decision in favour of the Respondent. This appeal was then brought.

Sir *R. Baggallay*, Q.C., and Mr. *Wickens*, for the Appellant:—

The devise to the eldest son of *Francis Beaufort* was contingent on *Francis Beaufort* himself coming into the possession of the estate. He never did come into possession, and therefore the condition on which alone the Respondent claims to be entitled never happened. It was part of a double event, and the double event not having occurred the limitation founded on it never took effect. The words "in case the said *Francis Beaufort* should come into possession" are material, and cannot be struck out of the will. There is no general evidence of an intention of the testator inconsistent with them which would justify such a course. Those words constitute a condition which has not happened. *Pearsall* v. *Simpson* (1) is not an authority governing this case, for at the time that case was decided the Courts were in the habit of looking to find

(1) 15 Ves. 29.

what was the probable intention of the testator, and deciding on what that appeared to be, and not on the words to be found in the will itself. A different rule of construction prevails now. Besides, what was there contended to be the condition applied to persons whose rights in no way depended on those of the grantee of the life interest in the fund, and on that ground was held by Sir *W. Grant* to be no condition at all affecting them. But here it is, in the words of his judgment, "a direct condition that if *A.* lives to a particular period he shall take; otherwise he shall not." And the persons who claim here are those who are to take through and under *Frances Beaufort*, as to whom therefore these words must be treated as creating a "direct condition."

Then comes the principle clearly laid down in *Grey* v. *Pearson* (1), that "in construing statutes and written instruments the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity, repugnancy, or inconsistency." *Maddison* v. *Chapman* (2) was a strong instance of the application of that rule, and there the decision of Vice-Chancellor *Wood* was supported by the unanimous opinions of the Lord Chancellor, and the two Lords Justices in the full Court of Appeal (3). Now in that case the Vice-Chancellor said that if any superadded limitation not connected with the previous limitation, but clearly a superadded condition, was imposed by the testator it must be fulfilled. It is so imposed here. In the previous part of the will nothing is said of the coming into possession; but in the part relating to *Francis Beaufort* it is a superadded condition. In *Martin* v. *Holgate* (4) the gift was independent—here it was substitutional.

A new succession is introduced here and the remainder is destroyed. A condition precedent to the taking of the children is introduced, namely, that the father shall "come into possession." That condition was not fulfilled, and the estate dependent on it did not arise. The words used must have their ordinary meaning, that being the modern rule of construction.

Sir *R. Palmer*, Q.C., and Mr. *A. J. Wood*, for the Respondent, were not called upon.

(1) 6 H. L. C. 61, 70, 106.
(2) 4 K. & J. 709, 719, 724.
(3) 28 L. J. (Ch.) 450.
(4) Law Rep. 1 H. L. 175.

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THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, it appears to me that I ought to ask your Lordships to concur with me in coming to the conclusion that this appeal should be dismissed. The question arises upon a very short will of a testator named Mr. *Edgeworth*, and the Judges in *Ireland* were invited, on a proceeding similar to that of a special case in *England*, to give their determination upon the interests taken on the one hand by the Appellant, if any, and on the other by the Respondent, under this somewhat imperfectly constructed will, which, nevertheless, (regard being had to the rules that for a long time have governed all the Courts in arriving at a conclusion on a limitation of this description,) has a sufficiently clear interpretation.

The scheme of the will is evidently this:—The testator, having three brothers, is minded to dispose of his property in this way. He gives first an estate for life to his elder brother, and then, in the event of that brother dying without having issue living at the time of his death, he disposes of it to his second brother, *Francis Beaufort Edgeworth*, for life, and, in the same manner, in the event of his not having issue living at his death, he disposes of the property in favour of the third brother in fee, the issue of his two brothers then being exhausted. In the event of the two brothers being dead and having left no issue, either male or female, he passes it over to the third brother in fee.

The mode in which the testator expresses these limitations is this,—he says, first I give it "unto my brother *Charles Sneyd Edgeworth* for life, and in default of his having issue living at the time of his death, to my younger brother, *Francis Beaufort Edgeworth*, for life." What is the mode, therefore, in which *Francis Beaufort Edgeworth* is to become possessed of the property? He is not to be possessed of it except in a given event, namely, *Charles Sneyd Edgeworth*, his elder brother, having died, and not having left issue him surviving. In that event, and in that event only, under the first limitation, can he acquire the possession. Then, having given that limitation with respect to *Francis Beaufort Edgeworth*, the testator proceeds to say that in default of *Francis Beaufort Edgeworth* having issue living at the time of his death. *Michael Pakenham Edgeworth*, the Appellant, is to take in fee,

And then, having intimated clearly by this form of gift that he is contemplating the same devise with reference to the issue of the two brothers, he proceeds to expound his view in that respect, and he says: "But in case *Charles Sneyd Edgeworth* should die leaving issue, my intention is that such issue, if a son, should take the same estate to him and his heirs, and if more than one son, then to the eldest: but if such issue be a daughter, then to her and her heirs, and if more than one, to them and their heirs as tenants in common, and not as joint tenants."

Having disposed, therefore, of that interest, which he evidently, in the previous part of his will, contemplated as an interest which he was desirous of giving to his elder brother, he proceeds to the case of that elder brother dying without having any child at all, in which event the previous part of his will would have brought *Francis Beaufort Edgeworth* into possession, and he then says: "And in case *Francis Beaufort Edgeworth* should come to the possession of the said estate hereinbefore limited to him, and should die leaving issue, said issue to take in like manner life estates as hereinbefore limited to the issue of the said *Charles Sneyd Edgeworth*." He made a mistake with regard to the words "life estates," which I do not pause upon more than to notice.

Now what is the plain meaning of those words? The testator has settled in what event he intends *Francis Beaufort Edgeworth* to have possession; it is only in the event of his brother predeceasing him, and leaving no issue him surviving. Now I take up the case of that event having happened. Upon that event having happened *Francis Beaufort Edgeworth* will be in possession, and if he should die leaving any issue they are to have the same benefits as *Charles'* issue would have taken upon *Charles'* death leaving issue. The testator's mind is not directed to the circumstance in any way, as it appears to me, whether or not *Francis Beaufort Edgeworth* be living at the time of *Charles'* death, and in that sense capable of taking possession, but he is directing his attention to the previous limitation that he has made, namely, a limitation of the possession in a given event. And he says in fact,—If that limitation takes effect; if he comes to the possession of the estates hereinbefore limited to him for life in consequence of the previous part of my will taking effect (by his brother predeceasing him without leaving

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issue), then I also proceed to limit the interest to his issue, which I intended first to limit to my two brothers before carrying over the property to my third brother.

This seems to me precisely to fall in with the rule laid down by Lord *Hardwicke* in *Avelyn* v. *Ward* (1), where he said, "I know no case of a remainder or conditional limitation over of a real estate, whether by way of particular estate so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation; but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place." Here the preceding limitation is really in this manner out of the case, and therefore now, as he says, this limitation is to take effect.

I adhere to the view which I seem to have expressed in *Maddison* v. *Chapman* (2), that if any superadded limitation, not connected with the previous limitation, but clearly a superadded condition, is imposed by the testator, that condition of course must be fulfilled. But I read this will as simply saying: "I look back to the previous limitations I have made. I see that I have intended *Francis* to take possession in a given event; if he takes possession in consequence of that event happening, then I proceed to say that which I intended to do." That is the simple meaning which makes the whole will clear and intelligible. It avoids the absurdity of supposing that the testator meant to create an intestacy in the event which has happened, and it disposes of the estate in the way in which it appears to me, from the first limitation contained in the will, he intended to dispose of it.

I therefore propose to your Lordships that we should affirm the decretal order which has been pronounced by the Court in *Ireland*, and that this appeal should be dismissed, and that it should be dismissed with costs.

LORD WESTBURY:—

My Lords, I have hardly anything to add to what my noble and learned friend has said. I feel convinced that if we came to any other determination upon the construction of this will we should travel very much indeed out of the beaten track, both of principle and of authority.

(1) 1 Ves. Sen. 420. (2) 4 K. & J. 709.

By the antecedent part of this will a life estate is clearly given to *Francis*, in the event of *Charles* dying without leaving issue living at his death. That is the express effect of the antecedent part of the will. The latter part of the will speaks of *Francis* coming into possession of "the said estate hereinbefore limited." That must not be confounded with the words as "coming into the actual possession of the estates hereby devised." It is coming into possession of the estate or interest hereinbefore limited, which is nothing more than saying this:—If the estates hereby given to *Charles* and his issue shall fail, or shall not arise, then the estate hereinbefore given to *Francis* will come to his possession.

It is impossible to annex to an estate previously clearly given an additional condition from words which are capable of being rendered historically, that is, which may be interpreted, as a description only of what must occur before the estate given to the person in remainder can arise. The antecedent limitation must fail. If the antecedent limitation fails, then the person in remainder is said to come into possession. Although that event does not actually happen, yet it happens in this way—the estate given to him becomes an estate by virtue of which he would be entitled to possession in consequence of the failure of the antecedent limitation.

You are to construe a will according to the intention of the testator, as it is to be collected from the language and the dispositions contained in the will; and you must construe the language according to its simple meaning, provided you are not deterred from so doing by some inconsistency or repugnancy, or some palpable absurdity, that is the result of following the literal meaning. It is plain from the dispositions of this will that *Francis* and his issue were to be put *pari conditione* with *Charles* and his issue. I draw a conclusion to that effect, not only from the order of disposition, but also from the words themselves. Upon the whole, therefore, we should unquestionably disturb that conclusion which is to be collected from the words of the will;—we should depart from the settled canons of construction—that you are not to construe words as importing a condition if they are fairly capable of another interpretation—and we should entirely defeat the intention of this testator, which plainly was to make a complete disposition of the property, if we adopted a conclusion which would leave that

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intention baffled, and end in having it declared that there was an intestacy.

LORD COLONSAY concurred.

LORD CAIRNS:—

My Lords, I concur with the observations which have been made. I only propose to add one word upon the subject of costs. I quite agree that if this is to be disposed of as a matter of strictness, according to the practice, which has so happily prevailed in recent years in your Lordships' House, the appeal must be dismissed with costs, should the parties not otherwise arrange. But I cannot help observing that this appears to be a contest of a friendly kind between an uncle and a nephew—that there has been only one hearing in the Court below, as I collect, for the Cause Petition appears to have been heard before the Lord Chancellor in *Ireland*, and therefore this is, in substance, only the second hearing—and it is a proceeding which appears to have been conducted, happily, at a very small expense—for nothing can be more compendious than the papers before us. Under these circumstances I have no doubt that, although your Lordships are bound in strictness to dismiss the appeal with costs, you will receive with great satisfaction any intimation from the counsel at the Bar, that they are prepared to adopt the course which was adopted in the Court below, namely, to arrange that each party should bear his own costs of the appeal.

Sir *Roundell Palmer* said that the inequality of fortune between these parties was very considerable, and that, even with the advantage of success here, the Respondent was very far from being well provided for, and therefore he was not authorized to waive the costs.

Decretal order affirmed, and dismissed with costs.

Lords' Journals, 9th March, 1869.

Solicitor for the Appellant: *D. E. Forbes.*
Solicitor for the Respondent: *Edward Walmisley.*

CECIL COLLINGWOOD (SPINSTER) . . . . APPELLANT;

AND

PHILIP FRANCIS STANHOPE AND EDWARD COLLINGWOOD . . . . . RESPONDENTS.

1869
March 9.

Shifting Clause—"Eldest Son" when ascertained.

In a settlement where there is a clause excluding the eldest son from the benefit of a fund provided for children other than an eldest son, the time for ascertaining who fills the character of eldest son is the period fixed by the settlement for the distribution of the fund.

In such a case "eldest" is not solely senior in age, for (as stated by Lord *Hardwicke* in *Duke* v. *Doidge* (1)), "Eldership not carrying the estate along with it is not such an eldership as will exclude."

A. was, under a will, tenant for life of an estate, remainder to his first and other sons in tail. On *A.*'s marriage a settlement was executed by which a fund was created and vested in trustees for the husband and wife for life, and after the decease of the survivor for the benefit of the children of the marriage, "other than and except an eldest son entitled under the will to an estate in tail male in possession, or remainder immediately expectant on the death of *A.*" There was a power of appointment in this husband and wife, and in the survivor of them. There were three children of the marriage—a son and two daughters. No joint appointment was made. The wife died. The son, on attaining twenty-one, joined with his father in barring the entail and resettling the estate, which was settled on the father for life, on the son for life, and on the sons of the son in tail. The father appointed one moiety of the trust fund to a daughter on her marriage. No appointment was made of the other moiety. On the death of the father the son claimed a share of the trust fund:—

Held, that though the character of eldest son was to be ascertained at the time of distribution of the fund, the son here was to be treated as the "eldest son entitled under the will," and consequently was not entitled to a share of the trust fund, for that his resettlement of the estate, and his taking under such resettlement an estate different from that given by the will, had in no way affected the character of "eldest son entitled under the will" which belonged to him when he came of age.

THE question in this appeal related to the construction of a settlement made on the 6th of September, 1820, on occasion of the marriage of *Edward Collingwood* (hereafter described as the father) with *Arabella Calcraft*. By a will dated the 26th of June, 1805, the manor of *North Dissington*, in the county of *Northumber-*

(1) 2 Ves. Sen. 203, n.

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land, was devised to certain uses until *Edward Collingwood* (the father) should attain the age of twenty-five years, when he was to have an estate therein for his life, remainder to trustees to preserve, &c., remainder to the use of the first and every other son of the said *Edward Collingwood* (the father), with divers remainders over. The marriage settlement recited the above matters, and also that Miss *Calcraft* was possessed of £10,627, £3 per Cent. Consols, and £2,115, Bank £4 per Cent. Consols; that *Edward Collingwood* (the father) was to insure his life to the amount of £15,000, the insurance to be assigned to trustees, and the payment of the premiums secured by a charge on the manor. All these sums were to be vested in trustees for the purposes of the marriage. The trustees were, out of these funds, to pay £100 a year to the wife during the joint lives of herself and her husband, and the residue to the husband, and after his decease, if she should survive him, to pay the dividends to her for her life, and after the decease of the survivor of the husband and wife upon trust, if there should be any child or children of the marriage, "other than and except an eldest, second, or only son, for the time being entitled under the will of 1805 to the manor, &c., thereby devised, for an estate in tail male in possession, or remainder immediately expectant on the death of *Edward Collingwood*" (the father); and the trustees were to transfer the trust funds "to and between or among such child or children other than and besides such eldest, second, or only son, entitled as aforesaid," and the issue, &c., "the same to be vested in such child or children other than and besides such eldest, second, or only son entitled as aforesaid," and the same to be transferred to them in such shares and proportions, and at such ages, and in such manner, as the husband and wife might appoint. The survivor (in default of a joint appointment) was to possess the power to appoint, by deed or will, and for want of such appointment the trustees were to transfer the same "between or among such child or children other than and besides such eldest, second, or only son entitled as aforesaid, in manner following, that is to say, if there shall be but one such child other than and besides as aforesaid, the said sums of, &c., to vest in such only child being a son at twenty-one, or being a daughter at twenty-one or marriage, and to be transferred to him or her on or at the same age, day, or

time, if the same shall happen after the decease of the survivor of the husband and wife. And if there shall be two or more children other than and besides such eldest, second, or only son entitled as aforesaid, then the sums, &c., to vest in and be transferred to, between, or among such two or more children in equal shares and proportions, the share of a son to vest at twenty-one, the share of a daughter at twenty-one or marriage."

The marriage of Mr. *Edward Collingwood* and Miss *Calcraft* took place, and there were three children issue thereof, *Edward Collingwood* (the son, the Respondent), and two daughters, *Arabella*, and *Cecil* (the Appellant).

Mrs. *Collingwood* died in 1840, during the lifetime of her husband, not having joined with him in making any appointment. *Edward Collingwood* (the son) attained the age of twenty-one in 1844.

On the 19th of February, 1846, the father and son joined in a disentailing deed, (subject to the settlement of 1820) reserving to themselves a power of appointment.

On the 20th of February, 1846, in the exercise of the reserved power, they limited the manor of *North Dissington* to such uses as the father and son should jointly appoint, created thereout an annual rent-charge of £500 in favour of the son, for the joint lives of his father and himself, and, subject thereto, settled the estate to the use of *Edward Collingwood* (the father) for life, by way of restoration of his former life estate therein; remainder to the use of the son for life, remainder to the use of the first and other sons of the son in tail, with an ultimate remainder to the use of the right heirs of the son.

In April, 1856, the father, in the exercise of the power of appointment vested in him by his own marriage settlement, appointed half of the sums vested in consols and secured by policies to his daughter *Arabella*, on her marriage with the Rev. Mr. *Calthrop*.

Edward Collingwood (the father) died in August, 1866, without having made any appointment of the remaining half of these sums.

In January, 1857, the trustees filed their bill against all the proper parties, setting forth the above facts, and praying that the rights and interests of all parties might be ascertained and declared, and proper directions given, &c.

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The cause was heard before Vice-Chancellor *Wood*, who, on the 15th of July, 1867, was pleased to declare that, according to the true construction of the deed of settlement, and in the events that had happened, the unappointed moiety of the trust funds was equally divisible between *Edward Collingwood* (the son) and his sister Miss *Cecil Collingwood* (1). This was an appeal against that decree.

Sir *R. Palmer*, Q.C., and Mr. *J. Pearson*, Q.C., for the Appellant:—

It is submitted that *Edward Collingwood*, the son, was, by the terms of the settlement, altogether excluded from any right to participate in the trust funds. He was fully provided for by the will, and, as eldest son took an estate tail in the manor, by which fact he became excluded from any share in the trust fund created under the settlement. It is not because he has himself thought fit to bar the estate tail given him by the will, and so vest a different quality of estate in himself, that he can entitle himself to share in the trust fund provided for the daughters. Yet his claim to this advantage has been admitted on the ground that the time when his father died was the proper period for ascertaining whether he was to be excluded from the personal estate, and that at that time he was only tenant for life of the real estate, and not tenant in tail, as he had been under the will. The case of *Chadwick* v. *Doleman* (2) laid down the principle which guides the Courts in cases like the present. There, by marriage settlement, *A.* was tenant for life, with a power to appoint certain sums in favour of younger children: the estate itself was given to *A.'s* first and other sons in tail. *A.* appointed to his younger children, and after the appointment his eldest son died, and the second became thereby eldest. *A.* then appointed anew, and directed that the share which he had previously given to this son (while only a second son) should go to the daughters; it was held that this new appointment was operative, the first appointment being made on a tacit or implied condition that it was to be void if the appointee became the eldest son. In this case there were two life estates in the personal funds, but only one in the manor. If the father had

(1) Law Rep. 4 Eq. 286. (2) 2 Vern. 528.

died first, the son would at once have taken the manor, but the mother would have continued tenant for life of the trust funds, which would not have been distributable until after her death. It is clear that under such circumstances the son could not have pretended any title to a share in the trust funds. His title could not be better because the mother died first, and because he, in conjunction with his father, thought fit to deal, for his own benefit, with the real estate, to which he was to succeed on his father's death. The alteration which, by his own act, he effected in the real estate could not give him a title to these funds which he did not before possess; for, if so, then it would follow that if he had thought fit to sell his interest in the estate, he would, for that reason, and because he had had the benefit of the produce of the sale, have had a new right, and one obtained at the cost of another person. In *Harrison* v. *Round* (1) there were two estates, both held by the father for life—after his death both limited in tail, the first to the eldest, the other to the second son. There was a shifting clause; there were three sons; the eldest died; the second son, who had thus become the eldest, joined his father in suffering a recovery of the first estate, effected a mortgage on it and received the money. On the death of the father it was held that the shifting clause took effect as to the second estate, Lord *St. Leonards* there observing (2): "It cannot be said, because the son has anticipated a portion of the estate which has descended to him, that the estate itself has not come to him under the limitations of the deed, and within the meaning of the proviso in question." If because the Respondent cut down his own estate in tail to a life estate, he was entitled to a share of the trust funds, he would have been equally entitled had he enlarged his life estate to a fee. He would in both cases have changed the nature of the estate, but he would not thereby have altered his position as to the trust funds. The principle which this House adopted as to succession duty in *The Attorney-General* v. *Lord Braybrooke* (3) applies here, and is decisive on this part of the case, namely, that a tenant in tail in remainder cannot change his rights and liabilities as such, by using his power to change the nature of the estate he will take on the death of the person in possession. That principle was afterwards recognised and

(1) 2 De G. M. & G. 190. 17 Jur 563.

(2) Ibid. 204. 17 Jur 566

(3) 9 H. L. C. 150. 7 Jur NS 741

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acted on in *The Attorney-General* v. *Floyer* (1); *The Attorney-General* v. *Smythe* (2); and *Lord Lilford* v. *The Attorney-General* (3). The power which the estate originally given conferred on the donee to change its nature cannot be taken into account. In *The Earl of Scarborough* v. *Saville*, Lord Chief Justice *Tindal* said (4): "We ought to disregard altogether the legal consequences which may follow from the nature and qualities of the estate when such estate is once collected from the words of the will itself." The case of *Fazakerly* v. *Ford* (5) does not govern the present. In the first place, the alteration in the estate there was not the act of the person who was to be excluded; in the next, the effect of that alteration was not only that he did not take the estate, of which the testator had been speaking, as beneficially as the original will had given it to him, but it did not "devolve" upon him as it had been supposed it would. In both respects this case differed from that.

The cases of *Windham* v. *Graham* (6), and *Tayleur* v. *Dickenson* (7), depended on the particular words of the settlements, and cannot, therefore, be treated as authorities governing the present. *Smith* v. *Osborne* (8) was cited to shew that where a man covenants with respect to a piece of land of which he expects to become possessed in a particular manner, and he becomes possessed of it in a different manner and by a different title, his covenant does not attach upon it. That doctrine is unquestionable, but it has no application here, for the change is the act of the law, or of other parties, but not of the party himself, and done for his own benefit; the property there did not in any way come to him under the same title; and for that reason the shifting clause became inoperative. Again, in *Ellison* v. *Thomas* (9), the circumstances were entirely different from the present case. There three successive life estates were created before the first estate in tail male came into existence, and the money was not to be raised till after the decease of the survivor of two persons, so that the period of the death of that survivor necessarily became that at which the character of "eldest

(1) 9 H. L. C. 477. 9 Jur. N.S. 1.
(2) Ibid. 497.
(3) Law Rep. 2 H. L. 63.
(4) 3 Ad. & El. 897-963; see also *Atkinson* v. *Hollby*, 10 H. L. C. 313. 9 Jur. N.S. 503.
(5) 4 Sim. 390; 1 Ad. & El. 897.
(6) 1 Russ. 331.
(7) Ibid. 521.
(8) 6 H. L. C. 375. 3 Jur. N.S. 1181
(9) 1 De G. J. & S. 518. 8 Jur. N.S. 113

son for the time being," was to be ascertained, and on that ground, and that alone, the case was decided; and the observations there made by the Lord Chancellor shew that in a case like the present, though the time for ascertaining the persons entitled to the fund is that at which the fund is to be distributed, yet that another principle, namely, that of excluding the person who has really had the benefit of the estate, is to be acted on. Here the Respondent had the full benefit of the estate, as conferred on him by the will, and so came within the clause of exclusion.

Mr. *Jessel*, Q.C., and Mr. *Martineau*, for the Respondent:—

In construing the clause of exclusion there must not be any words added to it in order to arrive at any possible supposed meaning of the parties to the settlement. The title to a share in the fund cannot be divested except on the clear and express language of the settlement. As it stands, the settlement shews that the period of distribution is the period at which the clause of exclusion is to take effect. The words, "for the time being," clearly point to such a construction. At that time it cannot be said that the Respondent was an eldest son taking the estate under the will; he took a different and less valuable estate. In *Matthews* v. *Paul* (1) a testatrix gave funds for the separate use of her daughter for life, then to her daughter's husband for life, and after his decease to be transferred to and among the children of the marriage, "except an eldest son," and there, a second son who by the death of his brother had become an eldest son, was excluded, because the Master of the Rolls held that the period for ascertaining who was to be excluded was the period fixed for the distribution of the fund; and the first son had died, and the second son succeeded before that period. This decision was come to though the reason for excluding the person who had originally been the eldest son, namely, the possession of an estate, did not apply to the second son, who, though he became the eldest, did not succeed to the estate. In *Ellison* v. *Thomas* (2) the period for raising was also the period for distributing the money, and that was held by Lord *Westbury* to be the period at which the character of eldest son was to be ascertained. The expressions of the Lord Chancellor are

(1) 3 Swanst. 328. (2) 1 De G. J. & Sm. 18.

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strong upon that point. There the exclusion was of "an eldest or only son for the time being," and His Lordship said (1), "The persons entitled must be ascertained at the time when the money is directed to be raised and divided, and the words of exception attach at that time upon the son who then answers the description." It is not merely the date of birth or of coming of age that decides this question, for it is well established that a younger son taking an estate has been treated as an eldest son, and an eldest son not taking the estate has been treated as a younger son: *Lord Teynham* v. *Webb* (2); *Duke* v. *Doidge* (3). In *Swinburne* v. *Swinburne* (4), before Vice-Chancellor *Giffard*, the rule as laid down in *Ellison* v. *Thomas* (5) was expressly followed.

The person to be excluded must be exactly described, and the exclusion directly pointed to him. It is not so here. On the contrary, the exclusion, affecting only the person taking the estate as "hereinbefore" settled, cannot be said to affect a person who does not take that estate, but takes one of an entirely different nature. If a person does not come into possession of an estate in the sense intended by a testator when he penned the clause of exclusion, that clause will not be operative as to him. *Taylor* v. *The Earl of Harewood* (6) is a strong authority on that point. That was a case on a shifting clause. In 1765 three estates, 1, 2, and 3, were settled on *R. D.* for life, remainder to his sons in tail male, remainder to *R. D.* in fee. By *R. D.'s* will, confirmed by his marriage settlement, the estates were given to *W. H. D.*, his nephew, for life, and to *W. H. D.'s* sons successively in tail male, remainder to another nephew with like remainders, and with remainders over. *W. H. D.* had sons; the first, named *W. H. D.* the younger, being in possession as tenant in tail under the will of *R. D.* the settlor, suffered a recovery of No. 2 estate, and afterwards made a will devising all his estates to *D. W. D.*, his cousin, who, after failure of several previous limitations, would have come into possession of it as a tenant in tail under *R. D.'s* will. In a suit in Chancery the Master found that *D. W. D.* came into possession of the estate, not as tenant in tail under the limitation in

(1) 1 De G. J. & Sm. 25. (2) 2 Ves. Sen. 198, and the cases there cited. (3) 2 Ves Sen. 203, n. (4) 17 Weekly Rep. 47. (5) 1 De G. J. & Sm. 18. (6) 3 Hare, 372.

R. D.'s will, but as devisee under the will of his cousin *W. H. D.* Vice-Chancellor *Wigram* adopted that finding of the Master, and held that, as a consequence, a shifting clause in another will had not come into operation. So in *Harrison* v. *Round* (1), which has been relied on by the other side, Lord Chancellor *St. Leonards* did not admit that the purchase-money of estates must be treated in the same way as if the estates themselves had come to the hands of the devisee, and he said expressly that if the first estate had passed to the hands of a third person, and had by him been given to the second son, "in such a case the second son would not have come into possession of it within the terms of the clause." He therefore clearly recognised the principle that a change in the nature of the estate would affect the application of an exclusion clause. And His Lordship did not question *Fazakerly* v. *Ford* (2), while he expressly declared his opinion that "the case before Vice-Chancellor *Wigram*" (*Taylor* v. *The Earl of Harewood* (3)) "was right," because "where an estate has actually gone out of the settlement, although it comes back to the party to whom it was given, it does not come in the manner in which it was intended." That is the principle which must govern this case. The son here did not get the estate which was the subject of the settlement, but something different from and inferior to it. Whatever might be his title when he came of age, that title was defeated and gone before the time arrived for the distribution of the fund, and the question whether he was the eldest son in possession of the estate was to be decided at the time of distribution and at no other time, and it was plain that though he had become the eldest son, he was not in possession of the estate as devised, and therefore he was not excluded from a right to participate in the trust funds under the settlement.

Mr. *Nalder* appeared for the trustees, but did not address the House.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, although I ought to regret, and do regret, that I should occasion, by an error committed in my decision in the Court below, inconvenience and expense to the parties concerned in the present appeal, yet I am bound to say that upon hearing

(1) 2 De G. M. & G. 190. (2) 4 Sim. 390. (3) 3 Hare, 372.

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the very able arguments which have been addressed to your Lordships on both sides, I have come to the conclusion that upon the second branch of the case I undoubtedly was led into error, by not sufficiently adverting to the distinction which manifestly exists between a case of this description and a case like that of *Fazakerly* v. *Ford* (1); possibly, I may add, like that of *Harrison* v. *Round* (2). I applied to a case falling within that class where the question is, whether upon the whole provisions of a marriage settlement the Court is to interpose the doctrine (from a very early period introduced, and employed even to some degree of forced construction) as to the wording of the settlement for securing equality amongst the children, to another set of cases of a different character where the question is, whether or not, there being a limitation of two estates, the one of which is to shift in the event of the other being held by the same member of the family who first takes the secondary estate, (if I may so call it,) that limitation is a condition which must be performed strictly, and if it cannot be performed strictly, whether the shifting clause does not fail to take effect.

Now, as regards the class of cases relating to settlements, they are of considerable antiquity, from the time of *Duke* v. *Doidge* (3), and *Chadwick* v. *Doleman* (4), downwards; and the principle of those cases is this, that the Court, with regard to all questions arising on provisions for children under a marriage settlement, holds that the principal intent to be imputed to the parties (however differently that intent may be expressed, so long as it is not contrary to what is actually found in the settlement) is a desire to provide equality for the children, that one child should not take a double portion, and that no child should be excluded. These seem to me to be the two beacons, or landmarks, by which the Court has directed itself in steering, sometimes undoubtedly, a very difficult and doubtful course.

That principle has led to this conclusion, that although it should be, in terms, said in the settlement that the elder child is not to have a portion, yet if under such a settlement the one who is really the elder child, the first born, does not take the family

(1) 4 Sim. 390.
(2) 3 De G. M. & G. 190. 17 Jur 563
(3) 2 Ves. Sen. 203, n.
(4) 2 Vern. 528.

estate, it has been held that, the family estate going to a younger son (which I also ought, indeed, to have mentioned as a leading part of that same system of exposition), the Court of Chancery does not regard the elder born as the elder son, but regards the younger brother, who is in possession of the family estate, as the elder, and the actually elder brother as the younger, in order to introduce him as a younger brother into the benefits of the portions provided for the younger children. That being so, it has been farther held that the Court will not, notwithstanding very strong words (as there have been in some cases) in the settlement to the contrary, hold the portions to be indefeasibly vested in the children in such a manner as to allow, on the one hand, a double portion to be given to one child, or, on the other hand, to allow any child to be excluded. And therefore it has come to this conclusion, that the period for ascertaining what is the true construction of the settlement with reference to the distribution, or the portions provided for the children, is that period when the distribution itself is to take place. Then, looking round, and seeing all the events which have happened in the family, though you may find that one child has held the place of a younger child during the period that the settlement has been in existence, that is to say, subsequent to the marriage of the parents, and holding in such case that the younger child has become entitled to a portion, nay even though that portion may have been assigned to him, yet if, at the period of distribution, that child has become the elder child, then he is no longer entitled to a portion, and the portion which has been assigned to him is no longer his; he takes the family estate, and the rest of the children are let in as younger children to the benefit of the fund out of which the portions are to be provided, including that portion of the fund which had been assigned to him who has now become the elder child.

Again, in the case of *Ellison* v. *Thomas* (1), the same proposition has been decided in the Court of Chancery, although, as the case has not come before this House, the question has not been hitherto decided by your Lordships. If the elder child who was entitled during the life of his parents to the estate predeceases his parents, so that that which was only a right in reversion never becomes an

(1) 1 De G. J. & Sm. 18.

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actual right in possession, and he never becomes the owner of the estate, but in respect of his next brother acquiring the ownership, that second son becomes the elder son—in that case it has been held that the elder son who had acquired that interest is entitled, or, rather, his estate, through the medium of his executors, is entitled, to a share in the provision intended for those who did not take the family estate.

In this case, therefore, it appears to me that I was not in error as to the period at which the rights to portions were to be ascertained with reference to the elder and younger children. I think it was at the period when the fund became distributable that it was to be ascertained whether or not the elder son had taken that which the elder son is by the law considered to be entitled to, namely, the benefit of the estate. Now, at the period of the distribution what were the facts? You found that the elder son had, during his father's lifetime, acquired this estate in remainder expectant on the termination of his father's life interest; that he had attained his age of twenty-one years; that his father and he had concurred in a resettlement of this estate; that all the purposes for which portions are provided (portions being always considered to be created for the purpose of enabling the children to provide for their own outset in life when they have arrived at the proper age, and for their own offspring) had been attained, and that the property had been resettled so as to make him tenant for life after his father's death, and to give him an immediate provision of £500 a year, and then to limit the estate after his own life estate for the benefit of his children. He, therefore, had the whole benefit of the estate which was provided for the elder son, and then there remained this fund distributable among the younger children.

Now here it is, as it appears to me, in the second part of the case, that I fell into error. If this estate could by any means have been carried wholly off, or if the elder son had died in the lifetime of his father, so as never to have enjoyed it, we should have had, in the one case, to consider a state of circumstances in which the case might well have been brought back to those where the elder son does not obtain the benefit intended to be provided for him, or a case coming within the last class of cases, in the same category as

Ellison v. *Thomas* (1), where, by death, the provision having passed from him, it was held that his executors were entitled to an equal share with the younger children of the family. But it appeared to me at the original hearing that I ought to be governed by the case of *Fazakerly* v. *Ford* (2), and the class of cases similar to that; and finding, as I did find, that at the time when the distribution took place, that which had been the elder son's property conjointly with his father, and had been so dealt with as I have described, was no longer vested in him (the son), as the terms of the marriage settlement provide, namely, as an estate tail (those are the terms of the settlement) but that he had been cut down from that estate tail to an annuity of £500 a year, and to an estate for life, and that it could neither be said that he had the estate given him in tail, nor the greater part of it (which is the expression in the settlement), I then concluded that the case was one which fell within the doctrine of that class of cases of which *Fazakerly* v. *Ford* (2) is an instance, recognised as that was, in *Harrison* v. *Round* (3). And I held that, first having ascertained the period at which I was to look round for the persons who were to share in the property, I was then to look at the individuals, and find whether, those persons being ascertained, they were in a condition to participate in the fund as elder or younger children. Finding this gentleman not in the position of the elder son, according to the description in which the elder son was in terms described as a person to be excluded under the will—finding him not possessed of the greater part of the estate, and not possessed actually of an estate tail at all, it appeared to me that he was entitled to fall among the class of younger children.

But in arriving at this conclusion I forgot the very foundation of this peculiar equity administered by the Court, which has been carried to a very great extent, as it was in *Chadwick* v. *Doleman* (4). The very foundation of that doctrine was, that the children should all partake equally—that the one should not be allowed to have an advantage over the others, except in this respect, that the elder son was looked upon by the law, where there was family property, as the person naturally to take the estate. When he took the

(1) 1 De G. J. & Sm. 18. (3) 2 De G. M. & G. 190.
(2) 4 Sim. 390. (4) 2 Vern. 528.

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estate it was held that he should not be admitted to participate in the portions provided for the younger children. Overlooking the very foundation of the rule, when I had arrived at the facts to which the rule should be applied, I applied cases having a different foundation in law to this case, which proceeds upon principles entirely peculiar with respect to provisions made through the medium of marriage settlements; and accordingly I erred in giving this gentleman that which, in truth and substance, he already possessed, namely, his share of the family property, he having already been put in full possession of his share, though, by concurrence with his father, he had made certain provisions which ultimately, after providing for his own interest, and his own family, carried the estate on to his sisters.

It is not necessary for me to pronounce any opinion whatever, and I expressly reserve my opinion, upon what might have been the effect if that provision had been simply a provision for the younger sisters, and as to how far I should have acceded to the doctrine propounded by Sir *Roundell Palmer*, namely, that anything done by this gentleman amounted to making himself the master or possessor of the estate so as to be equivalent to having property in it. I purposely decline expressing any opinion upon that argument; but I do find here that he has had the full benefit of the family property, and that he has had it in the manner in which, according to ordinary settlements and limitations in this country, the benefit is provided for the elder son—that is to say, when he comes of age, being tenant in tail, his father being tenant for life, and the two concurring in making a resettlement of the property. I think that it is a case in which I should not shrink for one moment from admitting the error into which I fell on the original hearing of the case.

Therefore I propose to your Lordships that we should reverse that portion of the declaration which was founded on an error, and substitute for it a declaration that the Appellant is now entitled to the whole of the unappointed fund, which I understand is a sum not exceeding one-half—that is to say, not exceeding the settlement of her sister; the other, of course, would have to be brought into hotchpot, and that would have the effect of excluding the sister altogether: that is the effect of the settlement.

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LORD WESTBURY :—

My Lords, it appears to me that a great distinction must be made between the clause now before us and those clauses commonly denominated shifting clauses, which are applied in settlements for the purpose of determining the existing uses of an estate, and giving birth to new and different uses. These shifting clauses operate entirely under the *Statute of Uses;* and one of the cardinal principles of the law of uses is this, that a new use will not arise unless the conditions and terms on which it is to come into being are strictly followed. But the clause that we have to deal with is not a clause determining existing interests, or giving birth to new interests, but a clause used for the purpose of carrying into effect the great object of parties in making a provision for children, namely, that no one child should obtain a double portion at the expense of another.

These clauses ought to be so construed and dealt with as to promote the object for which they are introduced, and which they were intended to serve; and if you construe them with reference to the rule applicable to shifting uses, and give to them an interpretation by which you defeat the object for which they were introduced, you make a cardinal error in the interpretation of instruments where the language is to be dealt with (certainly not departing from its meaning) with a view to obtain the object for which the provision was inserted into the settlement.

Now I quite agree that the character of eldest son is to be ascertained at the time appointed for distribution. That is settled by the cases which have been referred to; in fact, it arises from the necessity of the case. I see no reason to quarrel with the decision which was come to in *Ellison* v. *Thomas* (1); neither do I find that there is contained in it, either in the decision itself, or in the language of the Judge who pronounced it, anything which is an impediment to the course which my noble and learned friend proposes to take upon the present occasion. In *Ellison* v. *Thomas* an interpretation was required of the words "for the time being." The facts were simply these :—There had been several sons; one had become the eldest son, but had received no benefit, and then

(1) 1 De G. J. & Sm. 18.

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another was the eldest son at the time appointed for the distribution. Accordingly it was held, reversing the order of the Vice-Chancellor, that the proviso for exclusion operated only to debar that person who answered the description of elder son at the time appointed for distribution. The result was, that the elder born son who had predeceased his younger born brother became, according to principles well established in Equity, in the eye of the Court of Equity a younger son, and not an elder son. Because "elder" is not merely senior in age, but is judged of with reference to this great and important condition, namely, that it must be that eldership which, in the language of Lord *Hardwicke*, carries the estate with it. He who, by reason of his being elder at the particular time, carries the estate, is elder for the purpose of the application of these rules, although in point of age and natural birth he may not be the elder son.

I beg your Lordships' attention to this—that in the description contained in this settlement of the person who is to be ascertained at the period of distribution there are two things to be observed. The one is the age of the individual, and his relation to his parents and his brothers and sisters in point of birth—that is the relation which will stamp upon him naturally the character of being elder or younger. But there is superadded to that another thing, namely, his being "eldest, second, or only son for the time being entitled under the said will"—"for the time being" belongs to "eldest, second, or only son;" "entitled under the said will" is a thing superadded. It is quite right to say that you must refer to the time of distribution for the purpose of ascertaining who at that time, that is, for the time being, is the "eldest, second, or only son." But neither the authorities, nor the reason of the thing, require you to refer to that time for the purpose of ascertaining, or rather for the purpose of requiring, that the individual upon whom you stamp the character of being "eldest, second, or only son," shall also be at that particular time entitled to the estate in question. There is no necessity for doing any such thing. You must find that that individual who at the particular period of time answers the character is also the person who is, or has become, entitled to the estate. And if it were otherwise I think the most absurd consequences would ensue. A man, acting

with his father, may have sold the estate only the day before the death of his father, and received the purchase-money, and put it in his pocket; and then, in defiance of all reason and common sense we are to hold him to be a person that does not answer to the description of being entitled to the estate, because on the day subsequent to his full enjoyment and full possession of the entirety of that estate the father dies, and the period of distribution arrives.

My own opinion is that the fact of the father and son joining in an act of disposition in order to prevent the devolution of the estate, was intended to be met in the clause by the words "or in remainder immediately expectant on the decease of the said *Edward Collingwood*," because this would be the result—as soon as a person is found to be for the time being the eldest or only son, and also to be entitled in remainder immediately expectant, a disqualification attaches to him, prospectively and contingently, on his answering to the character of "eldest or only son" at the time of distribution. And it would be absurd enough to hold that if a disqualification is attached to him, the circumstance of his selling the estate, or making a different disposition of it, having thereby had the full enjoyment of it, shall restore him to the category and to the class of persons entitled to the benefit of other property from which we find that he has been already excluded.

My Lords, these things are to be determined in conformity with the principles to which I have already referred. It is the good sense and reason of the thing that they should be so applied, doing no violence to the rules of construction, but applying them in such a manner as will best promote the object of the parties. That used to be expressed by Lord *Thurlow* in a phrase which has become rather too trite a one, namely, that it should be interpreted according to the truth and honour of the settlement. There is a little too much laxity in that. It appears to me that it ought to be interpreted according to the plain object and obvious intention of the parties. That may be done in the present case, for the word "entitled" would comprehend being entitled and having had the full enjoyment of the property at any period, although that period happens to be anterior to the time appointed for distribution, which is the only *punctum temporis* to which you are to look for the purpose of ascertaining whether the individual at that time

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answers the character required, which character required is, the relation of eldest, second, or only son, and no other. The other part of the description is not made dependent upon its being in existence, literally according to the meaning of the words of the testator, at the time appointed for distribution.

LORD COLONSAY:—

My Lords, I entirely agree in the judgment which has been proposed by my noble and learned friends. The question arises out of a deed having for its object, in that part of it which we are dealing with, the provisions made for children. In making those provisions two subjects are dealt with—there is an estate called the manor of *Dissington*, and a certain fund; and the substance of those provisions, as I read the deed, is this: that the children, other than the one who is to be entitled to that estate of *Dissington*, are to have the funds divided amongst them, subject to certain conditions. Then the question comes to be, whether this party coming at the moment for the first time into the benefit or enjoyment of the estate (for he had not enjoyed it previously), but having anticipated it, as I may say, and having obtained it already, would still be entitled to have a portion along with the other children? This case was put to us: suppose that he and his father had concurred in selling the estate, and that he had pocketed the whole price of the estate, he would still not have been within that clause which is called the clause of exclusion from this portion.

Now, giving the fair meaning and effect to the principle of always seeking to avoid double portions being given to children, a principle which is not peculiar to deeds constructed in this country, but which is a general common principle of fair dealing with such deeds, I have no doubt that the party having got such benefit from the estate as he chose to take, is not now entitled to encroach upon the provisions of the others by taking a double portion.

LORD CAIRNS:—

My Lords, my noble and learned friend upon the woolsack having, with that candour which is not the least conspicuous ornament of his character, reconsidered the opinion expressed by him

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in the Court of Chancery, and having proposed to your Lordships to vary this decree in the way he has pointed out, I have only to say that I entirely concur with his more considered opinion upon this case, and that I am quite ready to adopt the proposal which has been made.

I cannot help thinking that the fallacy which has pervaded the arguments of the Respondents in this case is this:—They have, in the first place, constituted by their argument a class of persons who filled the position of children at the period of distribution; and then they have treated the words of exclusion in the present case as if they were analogous to a shifting clause; and endeavouring to find out some words in that exclusion which, as they think, cannot be satisfied by the events which have taken place, they appeal to the well-known principle, that when once you have got an estate vested, you cannot divest it without the concurrence, to the letter, of the terms and conditions upon which the estate is to be divested.

Now, my Lords, in my opinion, the true mode to approach a clause of this nature is not to conduct a process of reasoning of that kind, but to ascertain, once for all, what is the intention of the settlement with regard to the class of persons spoken of in this clause as those who are to take the portions provided.

As regards the rule of law applicable to a case of this kind, I find it expressed so extremely well, if I may say so, in another case which came before my noble and learned friend on the woolsack while he was Vice-Chancellor, that I will take the liberty of reading a few words from it to your Lordships. I mean the case of *Macoulrey* v. *Jones* (1), in which my noble and learned friend said:—"It is now well-established law, that where the bulk of an estate is settled in strict settlement, and by the same settlement portions are provided for younger children, no child taking the bulk of the estate by virtue of the limitations in strict settlement shall take any benefit from the portions. And that is so whether the settlement does or does not contain an express provision to exclude him from a share in such portions." And, farther on, my noble and learned friend continued:—"The intention of the parties being clearly to provide portions for all children except such as should so take the

(1) 2 K. & J. 684.

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estate, the Court will carry that intention into effect. And in thus carrying out the intention of the parties, the Court has considered itself at liberty to go farther; and in *Duke* v. *Doidge* (1), where there was in the settlement a power to select the son who was to take the estate, and the third son was selected for that purpose, the eldest son was held entitled to a share of the portion, the Court saying, that 'every child except the heir is considered in equity as a younger; and that eldership not carrying the estate along with it, is considered not such an eldership as shall exclude by virtue of such clauses.' That, as far as words go, was a strong decision. In other respects it was a sensible one, the question being, what was the intention of the settlement."

When we turn to the settlement in the present case what we find is this, the provision is for the children "other than and except an eldest, second, and only son for the time being." But it appears to have occurred to the framer of the settlement that that alone, if he stopped there, would be insufficient, and that you would have there words such as "eldest, second, and only son," without any connection with the estate, words which would not indicate that the real object of the parties was to provide portions for those who did not take the estate. Therefore, in order to get rid of that difficulty he continues:—"entitled under the said will of the said testator, *Edward Collingwood*, to the said manor and other hereditaments at *North Dissington*, and other the estates therewith devised, or the principal part thereof, for an estate in tail male in possession, or in remainder immediately expectant on the decease of the said *Edward Collingwood*, party hereto."

Now, my Lords, without, in the first place, scanning those words accurately, I should say that, in substance, what they are intended to express is simply this, that the child to be excluded is the child who takes and has the benefit of the bulk of the estates. But even scanning the words according to their literal meaning, I apprehend that those words have been in this case exactly fulfilled, because when I inquire into the position of the son (the only son as it happened) who joined with his father in resettling the estate, making himself tenant for life after his father's death, and entailing the estate afterwards upon his issue, I apprehend that of him it

(1) 2 Ves. Sen. 203, n.

can be declared, to the letter, that he had become entitled under the will to the manor and other hereditaments in question as tenant in tail. He had so become entitled before the period of distribution; but it appears to me that that makes not the slightest difference. It was for him to consider whether he would leave his title as it then stood, or use that title for the purpose of creating a new devolution of the estates. He had become entitled to, and obtained the benefit of, the estates within the terms of the settlement.

My Lords, I quite agree that the proposed alteration should be made in the decree, and that the Appellant should be declared, in the events which have happened, entitled to the whole remainder, undistributed up to this time, of the portions of the younger children.

That the portion of the decree complained of be reversed, and the cause remitted, with a declaration that the Appellant is entitled to the moiety of the fund in the hands of the trustees, subject to the payment of the costs of the appeal. Subject thereto, decree affirmed.

Lords' Journals, 9th March, 1869.

Solicitors for the Appellant: *Coverdale, Lee, & Co.*
Solicitors for the Respondent: *Bischoff, Cox, & Bompas.*

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March 16-18.

THE DIRECTORS OF THE REESE RIVER SILVER MINING COMPANY, LIMITED, AND THE LIQUIDATORS OF THE SAID COMPANY . . . . . } APPELLANTS;

AND

JOSEPH MACKRILL SMITH . . . . . RESPONDENT.

Company—Misrepresentation—Directors—Contributory—Winding-up Order—The Companies Act, 1862.

4 Ch 499 – 501, 21
9 Eq 266,
10 Eq 506,
12 Eq 346-7-8,
7 Ch 57
13 Eq 119
7 Ex 222,
15 Eq 254
17 Eq 278
5 PC 404
4 CLD. 499 – 878
4 App Cas 618 – 619
5 CPD 377
20 CLD 43
23 Ch D 418-9 – 420-1-4 – 428, 433,

If, before a winding-up order is made a person files a bill against a company alleging that he had been induced by fraud and misrepresentation to become a member of the company, and on that ground praying to have his name removed from the lists of its members, he will (on establishing his allegations) be entitled to have his name removed from the lists of the company, although between the date of his filing his bill and the decree of the Court upon it, an order has been obtained to wind up the company.

Where a contract is voidable, but not void, it remains valid till it is rescinded.

This rescission is not confined to the time of the order of the Court declaring the contract void, but relates to the period when, by filing a bill for its rescission, a party has duly taken steps to rescind it.

The 98th section of the *Companies Act*, 1862, gives the Court full power to rectify the list of contributories as well after as before the date of the winding-up order.

Per LORD CAIRNS:—If persons make assertions of facts as to which they are ignorant whether such assertions are true or untrue, they become, in a civil point of view, as responsible as if they had asserted that which they knew to be untrue.

A. read a prospectus issued by certain persons, the directors of a company, who proposed to carry on the business of mining, and getting and crushing minerals in connection therewith, and on the faith of the representation (among others of a similar nature) there made, that a valuable mine in *America* had been contracted for, the claims in which were described as very profitable, wrote to apply for shares. It turned out that the mine contracted for was valueless. On the 30th of December, 1865, this fact (without the particulars) was communicated to him in a circular sent out by the directors. On the 19th of January, a second circular explained the particulars, and announced that another and a really valuable mine had been purchased by the agents sent to *America* by the directors. On the 6th of February, 1866, *A.* filed his bill to be relieved from his shares, to be repaid the money he had already paid on their allotment, and to restrain the directors from suing him for calls. On the 20th of April an injunction to restrain was granted. On the 27th, a Petition was presented for an order to wind up the company. On the 28th of May, a winding-up order was granted; *A.*'s name was placed on the

list of contributories. On the 10th of July, *A.* took out a summons to have his name removed from such list; but his application was, on the 13th of July, refused by the Master of the Rolls. The Lords Justices, on appeal, ordered *A.*'s name to be removed from the list, and this House affirmed that Order.

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THIS was an appeal against an Order of the Lords Justices, made on the 6th of June, 1867, by which they reversed a previous Order of the Master of the Rolls, and directed that the name of Mr. *Smith* should be taken off the list of contributories to the company.

The company was registered on the 5th of June, 1862, and the memorandum of association and the prospectus were dated on the same day. The capital was to be divided into 20,000 shares of £5 each. The memorandum stated the objects of the company to be: "To mine for the precious metals, and to reduce the same from their matrix, quartz, and other gold and silver and copper-bearing rocks, or earths, and other minerals, for the purpose of gain; the acquisition by purchasing, taking in exchange, or on lease, or by mining sett, or license, concession, grant, or otherwise, of any lands, mines, buildings, easements, rights and privileges, machinery, plant, and other effects whatsoever, which the company from time to time think proper to be acquired for any of their purposes, and the letting, selling, exchanging, or mortgaging any of the landed and other property and effects of the company, the mining and the granting of licenses for mining in or over any lands which may be acquired by the company, and the leasing of any such lands for mining, building, or other purposes, the erection thereon of mills, stamps, machinery, smelting works, and all such other works and buildings as may be advantageous or incidental to the company's business or businesses, and generally the carrying on the business of a mining, smelting, and crushing company." "The doing of all other things whatsoever which the company, from time to time, may think conducive to the attainment of any of those objects."

The articles of association declared (sect. 108), that "the business of the company is to be managed by directors, who are to exercise all such powers as are not, by the *Companies Act*, 1862, or by these articles, required to be exercised at a general meeting." (Sect. 111.) "The directors may adopt and carry into effect, or

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rescind upon terms, or otherwise, any contract, whether already made or hereafter to be made, by or on behalf of the company, as the directors may, in their discretion, deem expedient. A certain agreement dated the 5th of June, 1865, and made between Mr. *Peter Aaris* and the subscribers of the memorandum of association hereunto annexed is hereby confirmed." By sect. 112, the directors were "in their absolute discretion" to adopt any proceedings to carry the business of the company into effect; they might (sect. 113) acquire the business and property of any company or person carrying on any business included among the objects of the company, and (sect. 114) where the articles were silent they were to have power to do everything which they deemed conducive to the interests of the company.

The prospectus gave a highly-coloured picture of the wealth of this district where the mine contracted to be purchased was situated, and said, "The property which this company has contracted for consists of about fifty acres of land, and contains several very valuable claims, some of which are in full operation and making large daily returns." . . . . "The proprietor, who has amassed a large fortune during the last eighteen months, by working a few of the claims upon the property contracted to be transferred to this company, has, to shew his confidence in the prosperity of the company, agreed to receive the purchase-money in fully paid-up shares only, and to deposit these with the directors as a guarantie for the mines until returns are made enough to pay interest at the rate of 25 per cent. per annum, before which his shares are not to participate in any dividend whatever." It was announced as the intention of the directors to import crushing machines, and to carry on the crushing business, which was described as wonderfully profitable.

The contract spoken of was made with one *William Jones*, and all the statements as to the value of the property appeared to have been furnished by him to a Mr. *Peter Aaris*, a stockbroker, by him communicated to the directors, and accepted by them as true.

The Respondent, giving credit to the above statements, applied for 100 shares, and paid £200 in respect of them; his name was placed on the register of shareholders.

On the 1st of August, 1865, the directors sent out two of their number, Mr. *Peter Aaris* and Mr. *William Johns*, to inspect the

mine contracted for, to investigate into the title to it, and in certain events to purchase any other properties which they might deem eligible. On the 17th of November, 1865, Mr. *Johns* wrote from *San Francisco* to his brother directors, that he and Mr. *Aaris* had found the property of *Jones* "almost valueless;" but, he added, "as we knew that other mines which have a first-rate character could be purchased for a far lower figure, this was a matter for rejoicing." They did purchase another mine. This letter was received in *London* towards the end of December, 1865. It was communicated to all the shareholders on the 30th of December, and on the same day a call of £1 per share was made. Mr. *Smith* did not pay the call. On the 17th of January, 1866, Mr. *Aaris* and Mr. *Johns* returned to *London*, and on the 19th their full and formal report was sent out to all the shareholders, and a meeting was called for the 8th of February. On the 6th of February, 1866, *Smith* filed his bill against the directors, set forth the above facts, and alleged that he took the shares on the faith that the statements made in the prospectus and articles were true and accurate, and within the knowledge of the directors; and that but for such belief he should not have taken the shares, and he prayed that his name might be removed from the register of the company, and that the directors might repay him the sum of £200, and might be restrained from taking any proceedings against him in respect of the call of the 30th of December. Notice of motion in accordance with this prayer was given on the 7th of February, affidavits were filed, and the motion was heard, and on the 20th of April, 1866, Vice-Chancellor *Wood* granted the injunction to restrain the directors from proceeding to enforce the call (1). On the 27th of April a Petition by a contributory was presented for a winding-up order, and on the 28th of May the order was made. The name of the Respondent was placed on the list of contributories, and on the 10th of July he took out a summons that the register might be rectified by removing his name therefrom. On the 13th of July this application was heard before the Master of the Rolls, who dismissed it (2). On appeal, this decision was reversed by the Lords Justices (3). This appeal was then brought.

(1) Law Rep. 2 Eq. 264. (2) 36 L. J. (Ch.) 385.
(3) Law Rep. 2 Ch. Ap. 604.

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Mr. *Southgate*, Q.C., and Mr. *Graham Hastings*, for the Appellants:—

The application for shares here was not, as in *Rogers' Case* (1), conditional, but absolute. There was no fraud here, as in *Venezuela* v. *Kisch* (2). The directors are free from any imputation of misconduct. They had every reason to believe the statements of *Jones*, and they truly published all that they knew. The agreement into which *Jones* entered would have disarmed the most suspicious of men. The mine originally contracted for turned out to be worthless; but the directors had not done anything which inflicted injury on the company, they had only made a contract to purchase, and, when they found out the deception practised on them, they were able to rescind the contract and to obtain another mine which really was valuable. The promise of the prospectus was therefore fulfilled. [LORD CAIRNS:—Suppose the prospectus had been for a company to work a gold mine, and after the allotment of the shares the directors had announced that the gold mine was worthless, but that they had purchased a valuable coal mine, would the allottee have been bound to retain his shares?] In that case the allottee might have said that he had never proposed to take shares in such a company at all. But here the mine purchased was one which was strictly within the description of the objects and purposes of the company. There had been no change and no misrepresentation, and the directors did not go beyond the conditions in the memorandum of association. On the ground of fraud or misrepresentation the Respondent, therefore, has no claim to relief, even as against the company, certainly he has none as against the creditors of the company. Then could he ask for relief on merely technical grounds? He could not. He had been guilty of delay in filing his bill. He knew on the 30th of December, 1865, as much as he knew at any time afterwards, but he allowed his name to remain on the register, and did not take any steps to remove it till the 6th of February, 1866. On that day he filed his bill, praying to have his name removed from the list of shareholders, to have the £200 he had paid returned to him, and to stay any proceedings that might be brought against him for calls. He obtained his injunction for this last purpose, but before he did anything else

(1) Law Rep. 3 Ch. Ap. 633. (2) Law Rep. 2 H. L. 99.

a winding-up order was obtained, and after that his application to have his name removed was too late, and it was refused by the Master of the Rolls. He was not entitled to such relief after the date of the winding-up order. [LORD CAIRNS:—If nothing had been done before the winding-up order, this would have resembled the case of *Oakes* v. *Turquand* (1); but here the Respondent had actually filed his bill asking for that special relief before that order was applied for.] But there had been no order on that point, and till his liability was declared at an end it continued as to all persons, especially as to creditors. [LORD CAIRNS:—This was a voidable contract, and in that case, as suggested by Mr. *Mellish's* argument in *Oakes* v. *Turquand*, the question arises whether "the contract being not void but voidable, means void till affirmed, or valid till disaffirmed."] The Respondent had been rightly put upon the register of the company under the 23rd section of the *Companies Act of* 1862 (25 & 26 Vict. c. 89). In *Oakes* v. *Turquand* it was held that the shareholder rightly put on the register was not relieved from liability till the contract was declared to be rescinded, and that was a very strong case, for there fraud had been committed, though no fraud was suspected till the company actually stopped payment, and consequently till then there was no apparent ground for the shareholder asking for relief. Here the Respondent was rightly, and without any fraud, put on the list of shareholders: *Evans' Case* (2); *Nation's Case* (3). He had full means of information, and with those means of information he agreed to take shares, and paid money on them. Under such circumstances he could not claim to be relieved from all liability while his name still remained on the list. [LORD WESTBURY:—Would fraud at any time vitiate his agreement?] As a general rule it might, but that question does not apply here. It has been held by Lord *Cairns*, sitting as Lord Chancellor, that a Plaintiff cannot be relieved from shares in a company upon the ground of misrepresentation in the prospectus, on a bill filed after the date of the presentation of a Petition for winding up: *Kent* v. *The Freehold Land Company* (4). *Oakes* v. *Turquand* was there taken as deciding the case, and shewing that nothing short of a legal release from

(1) Law Rep. 2 H. L. 325–338.
(2) Ibid. 2 Ch. Ap. 427.
(3) Law Rep. 3 Eq. 77.
(4) Ibid. 3 Ch. Ap. 493.

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membership is sufficient after a winding-up order has been made. That decision not only reversed the previous judgment in the same case (1), but in substance, also, affected the judgment in *Henderson* v. *Lacon* (2). [LORD CAIRNS:—In *Kent's Case* the bill was not filed in time. This Respondent filed his bill before the winding-up order, and his prayer in the bill was, that his name might be removed from the register of shareholders. Can it matter, in the result, that before a decree is made on that prayer, an order is obtained by some one else to have the company wound up?] The holding in *Oakes* v. *Turquand* (3) goes to that extent, and shews that a limited liability company is a partnership, though of a particular sort, and the remedies of creditors and the liabilities of shareholders are the result of the peculiarity of its character as a partnership. Though entitled to remedies against those who had deceived him, if he had been deceived, a shareholder in such a case would still be liable to the creditors of the firm: *Rawlins* v. *Wickham* (4). [LORD CAIRNS:—Suppose a case of an ordinary partnership. *A. B.* is induced, on the 1st of January, by fraudulent representations to enter the partnership; he remains in it till the 1st of February; he is liable, of course, on all the partnership contracts entered into during that month; but on the 1st of February he gives proper notice of his intention to conclude the partnership, and files a bill for that purpose. A month passes by before the hearing. Is he liable on all the contracts made in the meantime?] Till recently the answer to that question must have been in the affirmative. Now the law is settled: *Cox* v. *Hickman* (5). [LORD CAIRNS:—Suppose there were six large shareholders; they believed they had been by fraud induced to become so, and they filed six bills to relieve themselves of their shares, and then one of the directors obtained a winding-up order, is it contended that every one of the six would be fixed by the act of the director because no order had been made on their bills?] They would be so as to creditors.

Mr. *Cotton*, Q.C., and Mr. *Eddis*, for the Respondent, were not called on.

(1) Law Rep. 4 Eq. 588.
(2) Ibid. 5 Eq. 249.
(3) Law Rep. 2 H. L. 325.
(4) 3 De G. & J. 304.
(5) 8 H. L. C. 268.

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THE LORD CHANCELLOR (Lord *Hatherley*) after stating the nature of the appeal, the Order of the Master of the Rolls, and the subsequent Order of the Lords Justices, said:—

Two questions arise in this matter; the first of which is this:—Had Mr. *Smith* really any right whatever to insist upon his name being removed from the list, without regard to any difficulties which may arise upon the construction of the statute of 1862? Mr. *Smith* says this: "True it is that I did apply for shares in your company, a company which you represented to me to be of such a character—true it is that those shares were allotted to me—and in that sense you may say, to a certain extent, that I agreed to become a shareholder in your company. But I so applied for those shares, which were so allotted to me, on the faith of a prospectus in which you described the property in a manner which I am entitled to say was false and fraudulent." Therefore, he says, "I am entitled to be relieved from that supposed contract which I am said to have entered into." Possibly it might have been argued that he might have said (though I do not think it is necessary to put it so high as that) "I never gave you authority to subscribe my name to such a company as you constituted." That, however, I think it is unnecessary to determine in this case. It is sufficient in this case if Mr. *Smith* can establish his first proposition, that he was induced to take the shares on a false representation, to justify him in saying that the contract is at least voidable. I do not assert it to be absolutely void *ab initio*.

Then how stand the facts upon that first part of the case? I think there can be really no question at all as to the merits of Mr. *Smith's* case. I do not enter into the detail of what I am reported to have said in giving judgment, but the substance of what I intended to decide is sufficiently apparent, namely, that the prospectus as issued was one describing, from beginning to end, a particular mine as a property of a particular extent, the property of a Mr. *Jones*, fifty acres in extent, and farther describing it as a mine which contained "several valuable claims," some of which were in full operation and making large daily returns, every word of which was untrue. There was no property of fifty acres of land, at least none has been pointed out, nor of any number of acres of land. And there were no valuable claims, and there being none

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of course they could not be in full operation, and they could not be making any returns. These things, being asserted positively and in distinct terms, it is not competent for the directors to say that Mr. *Smith* must have known that they knew nothing about it, because they lived in the City and did not live in the district where the property was, and therefore they could have no information about it. Mr. *Smith* is entitled to say, "I assumed that you, as men of character and honour, knew to be true that which you stated, and I find that not one word which you stated is true." That is the state of things with reference to the prospectus. It does not appear (as Mr. *Hastings* was compelled to admit) upon the face of the prospectus that there was any intention to work any other mines at all. There was an intention, they said, to set up some machinery upon some other property besides their own, but nothing was there stated about that. The memorandum of association is referred to in the prospectus, and parties applying for shares are told where it may be seen; and it may possibly be held, though it is unnecessary to enter into that question now, that this gentleman must be taken to have had an opportunity of knowing, and therefore must be taken to have known, of the memorandum of association. Certainly that would make no difference whatever as to the question of whether or not it would be a voidable agreement, because, what would happen? To use a common expression, they describe a bird in the hand in the prospectus, and several birds in the bush in the memorandum of association, and the gentleman would be most strongly affected, no doubt, by the value of the bird in hand, and upon that he founded his application for shares. It seems to me, therefore, that the agreement was *ab initio* voidable.

Then, the agreement being voidable, the next thing that occurs in the case is this: This gentleman files his bill to avoid it. That was before the winding-up had been ordered, before anything had occurred which could have prevented his success in the suit, his success in which would, for the reasons I have given, be undoubted. Having filed his bill, he applied for and obtained an injunction to restrain any action brought by the company upon the contract, and he having obtained that injunction upon the 20th of April, some contributory to the company, on the 27th of April, presented a Petition for winding up the company. The argument

then is this: We are (say the Appellants) within the rule laid down by this House in the case of *Oakes* v. *Turquand* (1). We find that there was an agreement, and that this gentleman was therefore, by the 6th section of the statute, a person who had agreed to take shares. And we find another portion of the statute which says that anybody who has agreed to take shares is a member of the company; and another which says that any one who is a member is, in certain cases, a contributory; and they contend, therefore, that Mr. *Smith* is brought by this process within the description of a contributory to the company, and that his name ought to remain upon the list.

The case of *Oakes* v. *Turquand* (1) was decided when the position of circumstances was this: A then shareholder had entered into what the House held to be a voidable, but not a void agreement, and then, to make use of the clear way in which it seems to have been put by Mr. *Mellish* in argument, and which was recognised by one of your Lordships, the question arose:—When you say that an agreement is voidable, and not void, and when Mr. *Oakes* endeavours to insist upon his having a right to treat it as void, is the agreement to be taken as valid until rescinded, or, when rescinded, to be taken to have been void from the first? It appeared to your Lordships, and with all humility I would say it appears to me, perfectly correct to say that the agreement subsists until rescinded; that is to say, in this sense—until rescinded by the declaration of him whom you have sought to bind by it, that he no longer accepts the agreement, but entirely rejects and repudiates it. It is not meant, I apprehend, by that expression "until rescinded," used by any of your Lordships at the time when that case was argued before the House, to say that the rescission must be an act of some Court of competent authority, and that, until the rescission by that Court of competent authority takes place, the agreement is subsisting in its full rigour. If it were necessary to use the word "rescinded" in any way in that sense, it appears to me that it would be more correct to say that the rescission by a Court of competent authority dates from the moment when proceedings were taken invoking the aid of that competent authority. See otherwise how the case would stand in a case of this description; a

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number of persons might have been induced by fraudulent representations to become shareholders in a company; they might upon discovering the fraud file their bill to rescind the agreement, and they might all of them be entitled to have the agreement rescinded by the Court, but it would be competent to the creditors, or even to the members of the company themselves, to present a Petition for winding-up, and to say, in spite of all that has occurred, in spite of the fraud that has been perpetrated upon you, and in spite of your taking prompt steps indicating your rescission of the contract, and asking the Court to affirm the resolution you had come to, by declaring that it is rescinded, notwithstanding all that, your steps shall be futile, we will hold you all to be members of the company, because we presented our Petition at a time (it might be presented the next day after the filing of the bill) before which it was impossible for you to obtain any order of the Court.

I apprehend the true view of the case is this. The agreement is valid until rescinded. If in a case of this description the directors had committed the fraudulent act of putting a man's name upon the list which they ought not to have put there, and had allotted him shares, so that if it turned out to be beneficial it would be competent to the person to say, "Now I elect to hold them, because, although coming to me by your fraud upon me, I find it is beneficial to me to hold them, and you cannot aver your own fraud to prevent my so doing;" in that case the directors could not have taken the name off the list without communication with him. But if immediately that he knows what the directors have done, he says, "I have made up my mind to reject the contract, and I assert that intention of mine in the plainest and most open manner competent to me, by my communication to you insisting upon having my name removed, and on your neglecting your duty to remove my name I proceed to file my bill to compel you to do so,"—I take it that thereupon the contract is at an end, and the gentleman is entitled to have his name removed from the list. Because it was the duty of the directors not to wait for the filing of the bill, if they knew, as we must assume them to have known, that the contract had been entered into upon those fraudulent representations. The moment they were told that the contract was rejected, and that he claimed no interest under that fraudulent act of theirs, it

was their duty to remove his name, which could no longer be retained there, the contract being thus avoided, and by that means to spare all farther controversy.

That, however, was not done; then what must be the next proposition on behalf of the Appellants? It must be that the directors having neglected their duty, having neglected to do that which they were manifestly bound to do, they had thereby given rights to creditors which, if they had performed their duty, could never have had any possible existence. The thing seems absurd upon the face of it, and I apprehend that happily the law does not justify such a proposition. If it is as supposed, we must find it within the four corners of the Act of Parliament upon which the right of the official liquidator must rest. Do we find it there? On the contrary, it has been pointed out by my noble and learned friend on my left, that there are two sections which shew clearly the position of a person so circumstanced. The 35th section says, that at all times it shall be competent to the Court to remove any one from the register who has been improperly continued there after he has ceased to be a member. Then that right existing, is it affected by the circumstance of a Petition being previously presented for winding up the company? The 98th section says, that all powers of correcting the list shall be continued, notwithstanding the order to wind up; and the power to the Court of correcting the list is one of the powers which is contained in the 35th section. It is one of the wholesome and useful powers which remain after a winding-up order has been obtained. Many cases have been cited, and many others might be brought forward, in which the list has been corrected by removing a wrong person from it, and putting a right person on it, and the creditors have been in no way damaged either by the one or the other. They have no interest in injustice being perpetrated, because it is quite as probable that they may be benefited by the right person being put on, and the wrong removed, as it is by the wrong person being kept on instead of the right. But however that may be, you are not to found a right or benefit upon the improper act of others.

The Legislature, therefore, having given the Court the power, it seems to me that it is perfectly competent to the Court to place

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this list in the condition in which it ought to have been. It ought to have been corrected by the directors without a suit. Certainly after the bill was filed it should have been corrected by them. There can be no question at all as to whether the contract was rescinded or not by Mr. *Smith*, who had a right to rescind it, because he asserts his right as fully and as effectually as he could do within the time that intervened between his proceedings and the winding-up, and he never in any way retreated from that position.

It seems to me that, under the circumstances, leaving *Oakes* v. *Turquand* (1) to stand as it does, we have here the case which was there alluded to, namely, a contract voidable but not avoided. The regular and proper course is, that this gentleman's name should be removed from the list, and therefore that the decision of the Lords Justices appealed from should be affirmed. And I should ask your Lordships to concur with me, that in dismissing this appeal we should direct that the costs of both parties should be paid out of the fund. The Respondent, I should say, is entitled to his costs; and the official liquidator, having instituted these proceedings with the leave of the Court, is of course entitled to his costs out of the estate. I shall, therefore, move your Lordships to affirm the Order, and direct that the costs of both parties be paid out of the estate.

LORD WESTBURY:—

My Lords, the nature of this case, and of the *dicta* and numerous decisions which have been pronounced upon subjects of this description, make me feel that it is exceedingly requisite to be cautious in pointing out the grounds upon which my opinion is formed, and in the language in which that opinion is conveyed. My Lords, I mean to express no opinion whatever (for it would be very improper so to do) with regard to numerous *dicta* which have been read as proceeding from noble and learned Lords in this House, but I would press upon your Lordships' attention that this case has a distinguishing feature, namely, that a suit was instituted, and was in full progress, and had given birth to a judicial order, at the instance of the present Respondent, anterior to the making of the winding-up order.

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Now, my Lords, it is idle to contend that the register of shareholders is, under the Act of 1862, made final and conclusive. It is no such thing. If it had been so it would have been simply necessary to say that all persons who appeared as shareholders on that register at the date of the winding-up order should continue liable to the creditors. No such thing is said, but on the contrary this is said, that those only are liable to the creditors who *have agreed to become* shareholders and whose names appear upon the register. Even that is not strictly accurate, because a man may be made a shareholder, and be liable, who has simply agreed to become a shareholder, although his name is not *de facto* on the register. Again, it is clear that the register is not final, because the register, after an order, may be purged of a number of persons whose names appear there, if it be shewn that their names have been placed there without any authority or any agreement on their parts. But it does not rest there, because the Act of Parliament contains a provision which not only makes it the duty of the directors to alter the register from time to time, but gives power to the Court, after an order, to rectify the register in case of default by the directors.

Then applying these things to the case which we have now to determine, the Respondent here, *Smith*, the Plaintiff in the suit, before the winding-up order asserted his right to be removed from the register. The determination of that suit, if it be in his favour, would involve this conclusion,—that at the date of the filing of the bill Mr. *Smith* had a clear right to have his name removed from the register. And that involves, also, this, that it was the duty of the directors, at the time when the bill was filed, at all events, if not before, to remove Mr. *Smith's* name from the register, and that gives birth to the farther proposition, that what the directors ought clearly to have done, there being a default on the part of the directors, may now be done by the Court in pursuance of the right asserted by Mr. *Smith* in that suit.

I apprehend, therefore, that your Lordships' order in this particular case will only enunciate this proposition, that if, on the ground of fraud well founded, the Plaintiff files his bill anterior to the winding-up order to have his name removed from the register, and to cancel the alleged relation asserted to have been created

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between him and the company, he has a right to pursue that suit to its consequence, and to have the consequence given effect to, notwithstanding it may be attempted to be interrupted by the obtaining of a winding-up order.

My Lords, individually I have been at a loss to find in the Act of Parliament any new principle or ground of liability, enacted by Parliament, as a reason why registered shareholders shall become liable to the creditors of the company, beyond what already existed in the law. By the law as it was before the Act, and as it has been since the Act, the right of a creditor of the company to have recourse to a shareholder would depend upon the question whether the shareholder was a *bonâ fide* partner in that company with which the creditor contracted. The creditor had a right to the liability of all *bonâ fide* partners, whether known or unknown to him at the time. And that right would appear not to have been enlarged, or to have had superadded to it any new principle of liability, by anything that is contained in the Act of Parliament. But, as I have already observed, my Lords, I mean to give my vote upon this question simply upon the ground that there was a *lis pendens, bonâ fide* instituted, and well founded, anterior to the winding-up order, and that on the ground of that suit this person ought not to be held liable to the creditors by reason of his name being found upon the register at the time of the winding-up order, improperly placed and retained there, against which he reclaimed and protested by the institution of that suit.

LORD COLONSAY:—

My Lords, I am of the same opinion. I think that the grounds on which this case is proposed to be decided will not interfere in any way with the judgment in the case of *Oakes* v. *Turquand* (1). This case, undoubtedly, as decided in the Court of the Lords Justices of Appeal, was referred to in the argument of *Oakes* v. *Turquand;* but it did not appear to me at the time that it was a precedent for arriving at the decision for which it was cited. I thought there was a plain ground on which, when it came to be farther discussed, the judgment would stand clear and independent of the judgment that the House was pronouncing in the case of

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Oakes v. *Turquand* (1). I have now heard the case argued, as to which I then reserved my opinion, and I have heard the opinions given by my noble and learned friends, and the grounds of the judgment now proposed are quite satisfactory to my mind, and cause me no longer to feel any hesitation as to the conclusion at which I should arrive upon the circumstances which have here occurred: namely, that the party having taken steps to have his liability judicially put an end to, and to have this contract rescinded, which he was entitled to have rescinded, and that having been done before the machinery for winding up was put into motion at all, he is entitled to be regarded as if that had been done by the Court at the time he demanded it. Upon the other part of the case I have no doubt at all that the grounds upon which he demanded to be relieved were good; of that I am quite satisfied.

LORD CAIRNS:—

My Lords, during the very able argument of the counsel for the Appellants in this case, an argument which, I think, has in a narrow compass afforded your Lordships every assistance which could be derived from the Bar, I have endeavoured to reconsider this case, I hope, without any prejudice arising from my having at an earlier stage taken part in its decision. And I quite concur in the opinions which have been already expressed.

As to the first part of the case, namely, that which rests upon the right of the Respondent, apart from the circumstance of the winding up of the company, to repudiate his shares in the company, I never have entertained, and I certainly do not now entertain, any doubt; and I hardly think it was gravely argued at the Bar that in this case a fraud had not been committed against the Respondent. When I say a "fraud," I do not enter into any question with regard to the imputation of what may be called fraud in the more invidious sense against the directors. I think it may be quite possible, as has been alleged, that they were ignorant of the untruth of the statements made in their prospectus. But I apprehend it to be the rule of law, that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of

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view, be held as responsible as if they had asserted that which they knew to be untrue. Upon that part of the case, my Lords, I apprehend that there is no doubt.

Now, as to the other part of the case, I certainly had not the advantage of being present at the argument at your Lordships' Bar in the case of *Oakes* v. *Turquand* (1), nor would it be proper for me to make any observation with regard to that which was the determination of your Lordships in that case; beyond this, if I may venture to say so, that I most entirely concur in the conclusion at which this House then arrived. I think that not only was the conclusion in that case founded upon a proper view of the law, but that it is also, as a matter of policy, of very great importance, in these cases, to make the register of any one of these companies as conclusive as, consistently with the proper interpretation of the Act of Parliament, you are able to do. But it is perfectly clear, my Lords, that you cannot make the register absolutely conclusive. Many cases can be pointed out, without difficulty, in which the register is not conclusive. It was admitted at the Bar, and must always be admitted, that if names are put upon the register without any authority the owners of those names are in no way responsible. There are also cases, especially those pointed out in the 35th section, where there has been a default, in the performance, by the executive of the company, of its duty in removing names after the owners of those names have ceased to be shareholders: there again the register is not conclusive. And again, under the same section, there is a class of cases which is thus described, namely, where the name of any person is, without sufficient cause, entered in, or omitted from, the register of members of the company; in that case the register is not conclusive.

My Lords, I say the register is not conclusive because, as has been already pointed out, notwithstanding the winding-up, the Court, under the 98th section, is to rectify the register of members in all cases where such rectification is required in pursuance of the Act, that is to say, at all events in those cases pointed out by the 35th section.

It therefore appears to me that the question in this case is, (it being granted that the name of the Respondent was entered upon

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the register,) was that name, at the time of the winding-up, without sufficient cause retained upon the register of members, and was there default made, or did unnecessary delay take place, in taking his name off the register of the company? That question is answered, it seems to me, by a very short consideration of the facts of the case. In this part of the argument it must be assumed that fraud was committed, and that there was a right on the part of Mr. *Smith* to have his name removed from the register. He discovered the fraud and, it is admitted, without any delay, stated his discovery to the company; he repudiated his shares, he required his name to be taken off the register, and, in order to make more emphatic his claim in that respect, he filed a bill in the Court of Chancery stating the facts, and praying that his name might be taken off the register, and he verified that bill by his affidavit. The exigency of the moment being to restrain an action for calls, he applied for an injunction, and no doubt the necessity for an injunction explains the reason why the bill was filed in preference to a motion being made under the 35th section. Upon that application he obtained an injunction of the Court, suspending the action of the directors as to recovering any call against him.

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Now, my Lords, that step was taken by Mr. *Smith*, of course, at his own peril. If upon the hearing of the cause it had turned out that he was wrong, and the directors right, he would have remained to this time a shareholder in the company. If, on the other hand, it turned out in the progress of the cause, as I think in the opinion of all your Lordships it did turn out, that he was right and not wrong, then I apprehend that the clear duty of the directors was, when the claim was made in a way as to which there could be no mistake, to comply with that which was the right of the Plaintiff in that suit, and to take his name off the list of shareholders, at all events upon the filing of the bill. Therefore this appears to me to be a case clearly coming within the 35th section, where there has been default in the executive of the company—there having been, at the time of the winding up of the company, a name upon the register which ought not to have been there. Upon these simple grounds, which in no way run counter to the determination of your Lordships in the case of

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Oakes v. *Turquand* (1), it appears to me that the Respondent in this case was right in obtaining the order which was made in his favour, and that this appeal ought to be dismissed.

Order complained of affirmed, and appeal dismissed; costs of Mr. Smith and of the Official Liquidator to be paid out of the estate of the Company.

Lords' Journals, 18th March, 1869.

Solicitor for the Appellants: *Thomas E. Harper.*
Solicitors for the Respondent: *Flux, Argles, & Rawlins.*

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JAMES McCORMICK . . . . . APPELLANT;

AND

WILLIAM GROGAN . . . . . RESPONDENT.

Will—Trust.

C. made a will leaving his whole property, real and personal, to *G.*, whom he also appointed his executor. When about to die, *C.* sent for *G.*, and, in a private interview, told him of the will, and on *G.*'s asking whether that was right, said he would not have it otherwise. *C.* then told *G.* where the will was to be found, and that with it would be found a letter. This was all that was known to have passed between the parties. The letter named a great many persons to whom *C.* wished sums of money to be given and annuities to be paid; but it contained several expressions as to *G.* carrying into effect the intentions of the testator as he "might think best," and this sentence, "I do not wish you to act strictly on the foregoing instructions, but leave it entirely to your own good judgment to do as you think I would, if living, and as the parties are deserving; and as it is not my wish that you should say anything about this document, there cannot be any fault found with you by any of the parties, should you not act in strict accordance with it." *G.* paid money to some of the persons mentioned in the letter, but not to all:—

Held, that in this case there was not any trust created binding on *G.*

IN this case the Court of Appeal in Chancery in *Ireland* (consisting of Lord Chancellor *Brewster* and Lord Justice *Christian*) had reversed a decretal order of the Lord Chancellor *Blackburne*, made under the following circumstances:—*Abraham Walker Craig*, a linen merchant of *Belfast*, died on the 29th of September, 1854, unmarried, leaving several relatives, including his father and three

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brothers, him surviving. In July, 1851, he had made a will in these terms, "I devise and bequeath the whole of my property, both real and personal, to my most sincere and valued friend, Mr. *William Grogan*, of *Wellington Place, Belfast*, and appoint him my sole executor. In witness, &c."

In the evening of the 29th of September, 1854, the testator having been suddenly attacked with cholera (of which he died a few hours afterwards), sent for Mr. *Grogan*, and communicated to him, in a private interview, the fact of having made the will long ago, leaving all his property to Mr. *Grogan*. The Respondent (according to his evidence in the cause) asked the testator, "Is that right?" to which the testator answered, "It shall be no other way," and then told him that he would find the will in a desk and a letter with it. No assent was asked from Mr. *Grogan* as to the contents of the letter. The testator died in a short time afterwards, and a brother of his opened the desk, and there found an envelope addressed to himself in the handwriting of the deceased. The envelope had inside it these words, "My dear *John*,—I request you will deliver to my sincere friend Mr. *Grogan* the enclosed in the event of my death. Yours sincerely, *A. W. Craig*, *Falls Factory*, 14th July, 1851." The envelope contained the will, and a letter in the following form:—

"My dear Mr. *Grogan*,—Seeing so much litigation and quarrelling arise in consequence of property being left in many hands, to prevent same in my own case I have thought it best to invest the whole of mine in your hands, as you will see by the enclosed will, and well knowing you will carry out my intentions to the best of your ability. I now state them. I leave to my beloved father £100 per annum during his life. To my sisters, *Mary Anne* and *Sarah*, my beloved cousin *Emily Benn*, and my aunt *Orr*, and my much esteemed friend Miss *Kitty Cochrane*, £30 per annum each during their lives. To my beloved cousins *Mary Ann* and *Sarah Walker* (daughters of my late uncle *James*), my esteemed relative *Elizabeth Benn* (daughter of my cousin *James*), my relative *George Craig* of *Ballymore*, near *Tandragee*, my much esteemed friend *Charles Woods*, of *Moygashel*, my valued friend *Robert McKinstry*, £20 per annum each during their lives. To my much esteemed friend Miss *Allen*, and her sisters *Bess* and *Jane*, Mrs. *Alice McClelland*,

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widow of my late friend *Robert McClelland*, of *Banbridge*, my present servant *Prudence McVeigh*, my late flax buyer *James Sandford*, of *Tandragee*, my present foreman hackler *James McCormick*, my carpenter *Patt Gullery*, my brother *John's* friends *George Gainford*, *Richard Gainford*, and *David Griffin*, and to Mrs. *Trainer* widow of my late foreman *Thomas Trainer*, £10 per annum each during their lives. To *John O'Neill* one of my present loftmen, and to my manservant *Robert McCann*, £10 per annum each during their lives, and at their deaths the same sum to their widows during their lives, should they, or either of them, survive their husbands. To my most esteemed *Ann Alexander*, widow of my late friend *James Alexander*, of *Rosehill*, £140 per annum during her life, and at her death to her four children for ever in the following proportions:—if living, to her daughter *Mary* £50 per annum, and to her three sons *Joseph*, *Samuel*, and *John*, £30 per annum each, should any of them die before their mother and not leave children then the share of the deceased to go to the survivors in equal proportions, or in whatever proportion you may consider them deserving of. After arranging for the due payment of the foregoing in whatever manner you may think best, I wish the remainder of my property to go to yourself and to my brothers *Thomas*, *James*, and *John*, in equal proportions, and to be sold or not as you may consider best for the benefit of all parties. I do not wish you to act strictly to the foregoing instructions, but leave it entirely to your own good judgment to do as you think I would if living, and as the parties are deserving, and as it is not my wish that you should say anything about this document there cannot be any fault found with you by any of the parties should you not act in strict accordance with it. I believe I have no other request to make, and the only excuse I can offer for imposing such trouble upon you is, that I would if required have undertaken a similar task for you. With best wishes for your happiness and all connected with you, believe me, your sincere friend,

"*A. W. Craig.*"

"There are a few friends which I have a sincere regard for, and which I would like to serve if in my power, but did not include them in the foregoing, knowing many of them do not require and probably would not accept a gift from me, and besides, I feel I

might not be justified in making more bequests lest the property should not turn out so as to leave a sufficient surplus after paying them, but give you the names of them below, and should any of them or their connections which you may consider worthy of assistance ever require same, and that there is a large surplus left after paying the foregoing, I request you will set aside such a sum before making any division with my brothers as you may consider sufficient to meet any case or cases that may thereafter arise, but should there not be property sufficient after paying the foregoing to meet such cases, I have no doubt if you will mention to my brother *John* my wishes, he will himself contribute, if in his power, to such cases when they occur. The names are as follows — *James Bristow, William Valentine, Thomas Valentine, Daniel Foster, James Carson's* family, children of my late friend *Bryce Smyth, John T. Carter, Robert Brown, William Martin, James Scott*, butter merchant, *Thomas Geys Hadden, St. Rollox, Glasgow, Foster Connor*, Mrs. *F. Connor* and all her sisters, children of my late friend Mr. *Thomas Mackey*, of *Glenbank*, Mrs. *Knox*, Mrs. *Malcomson*, all my deserving relatives, but particularly my aunt and uncle *Benn* and their children.

"Having written the foregoing in a hasty manner, and perhaps in such a way as you may not clearly understand it, I leave it to yourself to carry out the intentions as you may think best, and should the property not yield sufficient at first to pay the annuities and leave a good surplus, you can defer as many of them as you find least deserving, and can best afford to wait until the outer park becomes more productive.

"*A. W. C.*"

The Respondent, conceiving himself to be left, under the terms of the will, absolute master of the property, took out probate, and, though never recognising that any legal or equitable obligation was imposed on him by the letter, paid £5000 to each of the three brothers of the testator, and other sums of money to other people, but did not pay the annuities of all the people mentioned in the letter, and among the rest he did not pay the annuity to *M'Cormick*. A Cause Petition was presented by *M'Cormick* to have the trusts created by the letter as affecting the will declared; and Lord Chancellor *Blackburne* declared that the letter constituted a trust in favour

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of *M'Cormick*, and made an order accordingly. His decision was reversed in the Court of Appeal (1). This appeal was then brought.

Mr. *H. Law*, Q.C. (of the Irish Bar), and Mr. *Jessel*, Q.C., for the Appellant:—

The letter here did create a trust, which the Respondent must be considered to have accepted, and to have bound himself to execute. The principle that must govern cases like the present was declared in an elaborate judgment by Vice-Chancellor *Wood*, in the case of *Wallgrave* v. *Tebbs* (2), and is thus referred to and adopted in *Jones* v. *Badley* (3) by Lord Chancellor *Cairns*, who thus expresses its substantive purpose: "Where a person knowing that a testator, in making a disposition in his favour, intends it to be applied for purposes other than for his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him on the faith of that promise or undertaking, it is, in effect, a case of trust." Here the Respondent, before he proved the will, knew the contents of the letter. The testator had informed him of its existence, and he knew that it contained the wishes of the testator; he knew, from the letter, what those wishes were, and knowing them, and undertaking to execute the will, he bound himself to do so according to the wishes of the testator. Those wishes so expressed constituted trusts. In *Burney* v. *Macdonald* (4) one of the four persons to whom property was left on a secret trust knew nothing of the trust, but one of them had written to accept it, and the performance of it would have been enforced as to all, but that the trust itself was one which the law did not permit to be executed. That objection does not exist here. [The Lord Chancellor referred to those parts of the letter which desired that its contents should not be disclosed, and that Mr. *Grogan* should not be found fault with.] Those expressions were merely intended to protect the Respondent in the discharge of the trust against vexatious legal proceedings, but did not shew that no trust existed. The discretion given to the Respondent was so given because he, as a prudent man, would best know how to manage the property, so as to carry into effect all the wishes of the testator. That was

(1) Ir. Law Rep. 1 Eq. 313.
(2) 2 K. & J. 313. 2 Jun 1859.
(3) Law Rep. 3 Ch. Ap. 362, 363.
(4) 15 Sim. 6.

shewn by the part relating to the sale of the property, which, if made under certain circumstances, might be ruinous to it. The different parts of the letter shewed that only a limited discretion, one applying to certain matters alone, chiefly matters of management, was left in the Respondent; and the fact that as to these parts he was called on to exercise a discretion as to what was best, shewed that he was not intended to be made the absolute master of the property. Then there was an apology offered for "the trouble" likely to be occasioned to the Respondent, and the excuse was given that, under similar circumstances, the testator would have undertaken for the Respondent a "similar task." No such expressions of apology and regret could have been addressed to a man to whom property was left as absolute owner. Then there was the reference to "paying the foregoing," after which the Respondent was requested to set aside, &c., money for himself and the testator's brothers. These and many other expressions in the letter shewed that the testator had imposed a trust on the Respondent—a trust which he relied on to be faithfully and carefully executed; after the execution of which, but not till then, the Respondent was to share with the testator's brothers the residue of the property "in equal proportions."

Meredith v. *Heneage* (1) is not an authority the other way, for there not only was the devisee of the estate declared to be "unlimited and unfettered" in the power given to her, but, though persons were named as probable objects of bounty, there was, as Lord *Eldon* said, "no certainty as to the quantity of the property" to be given. Here there was no difficulty on that point. The facts of that case, too, were very peculiar, and made it quite inapplicable to the present.

Sir *R. Palmer*, Q.C., Mr. *George A. C. May*, Q.C., of the Irish Bar, and Mr. *A. M. Porter*, also of the Irish Bar, appeared for the Respondent, but were not called on to address the House.

The Lord Chancellor (Lord *Hatherley*) stated the facts, and then said:—

It is averred by the Appellant that Mr. *Grogan* having been so

(1) 1 Sim. 542, 565.

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informed of the letter as well as of the will, he acted in such a manner as to bring himself within the operation of the rule which has been long established in Equity, that a person apparently taking property by devise or bequest from a testator with this knowledge of the existence of another instrument, which he actually or impliedly undertakes to carry into effect, will be fixed as trustee with the performance of such instructions and directions as are given in that other instrument. Mr. *McCormick*, the Appellant, therefore, says that this annuity of £10 a year was by those instructions and that letter directed to be given to him, and that Mr. *Grogan* was informed, from the first, if not of the exact contents of that letter, yet of its existence, as a letter which was to guide and direct him in carrying into effect the testator's instructions, though unexpressed in the will; and that Mr. *Grogan* impliedly undertook to execute the instructions in that letter, and by not performing that undertaking, committed a breach of trust.

Now this doctrine has been established, no doubt, a long time time since upon a sound foundation with reference to the jurisdiction of Courts of Equity to interpose in all cases of fraud; and therefore if, for example, an heir said to a person who was competent to dispose of his property by will, "Do not dispose of it by will, I undertake to carry into effect all such wishes as you may communicate to me." And if the testator, acting on that representation, did not dispose of his property by will, and the heir has kept the property for himself without carrying those instructions into effect, the Court of Equity has interposed on the ground of the fraud thus committed by the heir in inducing the testator to die intestate, upon the faith of the heir's representations that he would carry all such wishes as were confided to him into effect. And the Court has said that the heir shall not be allowed to hold the property otherwise than as trustee for those with regard to whom the testator gave him the directions in question. So again, if a legatee states to the testator that upon the testator's confiding his property, apparently disposing of it, to him, the legatee, by a regular and formal instrument, he will carry into effect all such intentions as the testator shall confide to him, then that legatee, although he apparently may be held in law to take the whole interest, shall have fastened upon his conscience the trust of carry-

ing into full effect those instructions which he received upon such representations as I have described. And, farther than that, such an undertaking or promise on the part of the legatee has been held, in some cases, to be capable of being inferred from the conduct of the person when secret instructions have been communicated to him by the testator, which conduct has been held by the Court to be equivalent to an undertaking or promise on his part that he will abide by the instructions so communicated to him.

But this doctrine evidently requires to be carefully restricted within proper limits. It is in itself a doctrine which involves a wide departure from the policy which induced the Legislature to pass the *Statute of Frauds*, and it is only in clear cases of fraud that this doctrine has been applied—cases in which the Court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he so undertook to perform.

Now, in the case before us, Mr. *Grogan*, the Respondent, undoubtedly stands in a very favourable position in this matter. The will was made three years before it was communicated to him. He in no way induced the testator to appoint him sole executor and sole legatee of the whole property. On the contrary, it appears from the evidence that he was somewhat surprised when he was informed of the fact. There is therefore no anterior act on the part of Mr. *Grogan* which should induce the Court to come to the conclusion upon imperfect evidence of any fraud having been meditated and perpetrated on his part. He is therefore entitled to the benefit of having his conduct regarded as that of a man who stands perfectly *rectus in curiâ* at the outset of the transaction.

The will is kept by the testator for the period I mentioned without any communication with Mr. *Grogan*. On the day of his death he appears to have sent for Mr. *Grogan*, and to have communicated to him for the first time that he had been made sole devisee and legatee and sole executor. From all that we can judge by the evidence we have in the case (which certainly, in the peculiar circumstances of the case, is only the evidence of Mr. *Grogan* himself), it would seem that the whole matter might have rested there,

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as it had rested for three years before, without any farther communication being made to Mr. *Grogan*, except for an exclamation on his part which indicates, so far as any judgment is to be formed upon his conduct, a sense of moral right and propriety that does him credit. He was aware that the testator had many relations and friends, and when he was thus informed that the whole property was bequeathed to him, he said, "Is it right?" Except for that observation on his part, we have no reason to suppose that anything more would have been communicated to him than had been communicated during the three years previous. That observation having been made, the testator said that he would not have it otherwise.

Now from the expression so used by the testator, it appears to me, I confess, that he wished at once to indicate that he had formed a fixed determination to deal with his property in the mode in which he has dealt with it by his will, and there was nothing in that expression which could possibly lead Mr. *Grogan* to infer that there was any other purpose in the mind of the testator than that which he had formed (as it now appears) several years before, although that fact was not then communicated, and which he now informed Mr. *Grogan* it was his fixed determination to carry into effect. "The testator said he would have it no other way; and then, after two or three minutes' pause, he said I should find the will in his desk and the letter with it. I said I did not know which was his desk. There were several desks in his office, and I did not know which it was. He said that his brother *John* would shew me. I said that I hoped he was getting better, and that it was time enough to look after that, or something to that effect. That is, as near as I can recollect, what took place."

Now I think that we have here really a statement of all that passed. There is a great deal of cross-examination as to what impression was made on Mr. *Grogan's* mind by this communication, and this statement on the testator's part that the letter existed and was to be found in the desk. But I think we have reason to believe that all the words spoken, and the whole of the *res gestæ*, are exactly before us; and I think this remark may be made in Mr. *Grogan's* favour, that it was in his power undoubtedly, were he a dishonest man, being the only person present on that occasion, to have nar-

rated just as much or just as little as he pleased of what took place at that interview.

I think, therefore, we are bound to hold that he has disclosed all that then took place. And our judgment is to be formed upon that transaction; and we have to consider whether or not that conversation, coupled with the existence of the letter found in the same envelope with the will, brings the case within the rule of Equity to which I have referred. My Lords, I confess it appears to me that we should be pushing that rule to an extremely dangerous extent if we came to any such conclusion.

There has been a great deal of dexterity and skill shewn in the cross-examination of Mr. *Grogan*. I cannot myself see that there was any error, or mistake, or misapprehension, on the part of the learned counsel who cross-examined him in his mode of putting his questions. On the contrary, they appear to me to have been put with great skill. And all that he elicited was this, that Mr. *Grogan* states that he thought that the letter was connected with the testator's property. That has been turned about in the argument in a vast variety of modes. Mr. *Jessel* has endeavoured to persuade us that when Mr. *Grogan* said that he thought that that letter was connected with the testator's property, that was equivalent to his admitting that he thought that the letter was connected with the disposition of the testator's property, and that he therefore was content to acquiesce in taking the testator's property on the condition of performing all that might be found within the four corners of that letter.

Now, if you look at the whole conversation that passed, I think it comes to no more than this, that Mr. *Grogan* was startled at finding that the whole of this property was given to him by the testator, and that he felt a certain amount of scruple about it. But he had not brought about that state of things; and, so far, this case is wholly outside the authorities to which I have referred. He had been in no way instrumental in producing this result, but, being struck with it, he put it to the testator whether it is right that this shall be done. The testator tells him: "I will not have it in any other way." That being so, there was everything to confirm Mr. *Grogan* in the belief of this being the testator's intention and determination. And then, a few minutes afterwards, the tes-

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tator makes the additional remark: "You are to be my executor; you will find my will, and you will find a letter with it." And Mr. *Grogan*, in his cross-examination, says: "I thought that the letter would be found to have relation to the testator's property." That was a very natural conclusion to form; but I do not think that in any part of the subsequent cross-examination there is anything that would justify us in coming to the conclusion that this gentleman believed that the letter contained directions which he should be in any way bound to execute. Upon this subject there is this answer, upon which some reliance has been placed. It is in answer to the 46th question, which was put to him by the cross-examining counsel: "You left him under the impression that you would see his intentions that were stated in the letter carried out?" (Answer): "My impression was at the time that he purposely did not tell me the contents of the letter."

The argument before us has turned very much upon this, that Mr. *Grogan* is said to have been fencing with the questions put to him, and that whenever a difficulty was pressed upon him with respect to his knowledge or suspicion of the contents of the letter, from the mode and style of the testator's conversation respecting it, he always evaded it by saying: "I do not know the contents;" or, as in this instance, "I thought that he purposely avoided telling me the contents of the letter." Now, looking at the whole of the cross-examination, and the state of the facts which occurred at the time of this transaction, and the state of facts anterior to this conversation, with regard to Mr. *Grogan's* not having in any way brought about this state of things, I think that when all these circumstances are considered together we are bound to accept the evidence of Mr. *Grogan* as he gives it, namely, that upon being left for half an hour with his dying friend he was informed, for the first time, of his having left him his whole property, and his first impression, like that of an honest man, was: "Is the thing right?" In reply to which he is told that it must necessarily be so. And he is informed of the existence of the will, and of the existence of the letter to be found with it. And when he is called upon to ransack his memory eleven and a half years afterwards, it is not surprising that nothing more can be brought out than his statement that he thought that it related to the will.

I think that in such a meagre state of evidence, it would be carrying the doctrine to which I have referred much too far to apply it to the case of a person who has shewn no complicity in getting the will made, and who, upon the first communication which he received on the subject, seems to have sought to induce the testator to make a different arrangement, and is then informed that it is the testator's fixed determination to persevere in the arrangement which he has made. It would be a great deal too much to say that such a case can be brought within the scope of the authorities to which I have referred.

But there is a farther reason in my mind—my impression, he says, at the time was that the testator purposely did not tell me the contents of the letter. I do not think that we can fairly say that this gentleman, being pressed as he was in cross-examination by counsel, had the bearings of all the facts of the case prominently before his mind. Yet what do we find when we look at all the facts of the case, and at that letter. We find that the testator in that very letter expresses his desire that the letter should not be shewn by Mr. *Grogan* to anyone else, but that he should act upon it entirely according to his own judgment. I am not now introducing the second part of the case. I am only mentioning this now because it tallies exactly with what Mr. *Grogan* states to be his impression of the result of the conversation: "He told me that there was a letter in his desk, which I supposed had something to do with his property, but, as far as I could tell, he was desirous of not explaining what the contents of the letter were." I take that statement of Mr. *Grogan's* to be really an honest statement on his part of the facts. If you choose to say (which is the most that can be said upon the subject) that possibly it covered some little degree of self interest, regard being had to the increase in the value of the property, I think that it would be very unjust to press that to any extent with regard to a gentleman who seems to have been entirely unmixed with the transaction in its first inception; but, giving every possible weight to the effect which his position of interest might have upon his mind, it seems to me that the learned Lord Chancellor of *Ireland*, who first decided this case, drew an inference from the evidence which went far beyond what the evidence itself would justify.

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But we are told that it is not right to mistrust the weight of a judgment formed by a Judge of great eminence, who saw the witness and noticed his demeanour, and might gather much from that demeanour; and that we cannot have the same advantage in forming our conclusions. Now I confess that that remark would have had more weight with me, if it had not been for the concluding observations of the learned Judge, which I must say, have impressed my mind with a doubt as to whether he was not influenced by considerations which have nothing whatever to do with the demeanour of the witness; and which, as far as I am competent to form a judgment upon them, lead in exactly a contrary direction to the conclusions of the learned Judge. He seems to have been impressed with the circumstance that this gentleman did, to a certain extent, carry into effect the arrangements described in this letter of instructions. Now that appears to my mind the most natural thing in the world, it seems to be perfectly consistent with the character of a correct and honest man, which we must assume him to be until the contrary is shewn. Finding himself thus placed in a position which was in no way of his own seeking, and finding this letter of his friend, he has, to the best of his judgment, carried those instructions into effect, with the desire, doubtless, of doing that which he would think it right and reasonable to do, though under no possible legal obligation to effectuate intentions which were not properly and legally conveyed to him.

Now, with regard to the second part of the case, having formed this opinion upon the first part, it will not be necessary perhaps to say much beyond shewing how the instructions themselves, when they came to be looked at, really very strongly support the correctness of the conclusion that I have arrived at as to the whole result of the communications between the testator and Mr. *Grogan* on the day of his death. The instructions on their very face appear to bear this interpretation, that it was the testator's intention to leave Mr. *Grogan* sole and complete master of his property. Now, in the first place, what other theory is there that can give any account of his taking this singular mode of disposing of his property, except that he did not intend the instructions to have legal effect? There was no charitable trust concealed, nor any other trust of any sort which the testator was desirous of keeping back, because either the

trust might be illegal, or he might have doubts of its legality. There was no question of perpetuity, or anything else which could render it in any way more desirable for him, instead of effectuating his intentions in a proper and legal manner, by expressing them in a regular instrument, to do it in this strange and circuitous mode of giving the whole property to one man, and leaving an instrument utterly inoperative in law for carrying his intentions into effect. When you look at this instrument, and see the mode in which it is framed in its several parts, beginning with something which certainly looks like express gifts, and then qualifying those gifts in the very extraordinary manner in which he does qualify them afterwards, I think the letter itself, and all the circumstances attending it, lead to the conclusion that it was the full intention of the testator, uninduced by anything except that it was his own wish so to deal with his property, to give Mr. *Grogan* full and complete control over the property, and to leave the instructions simply as a guide which might assist him in the discretion which he would himself exercise. In fact, what I believe to have been his intention is better expressed than I can myself express it in the words of the Court of Appeal when reversing the decision of Lord Chancellor *Blackburne*. It is there said by the Lord Justice of Appeal: "If we could look into the thoughts of *Abraham Walker Craig* as they were at the moment when he was inditing the will and letter, I am persuaded that what we should find there would be a purpose to this effect, to set up after his decease not an executor or a trustee, but as it were a second self, whom, while he communicates to him confidentially his ideas as to the distribution of his property, he desires to invest with all his own irresponsibility in carrying them into effect." That, I think, is not by any means an unjust description of the instrument in question, because, after giving various gifts, and then speaking of a particular class of children, he says: "Should any of them die before their mother, and not leave children, then the share of the deceased to go to the survivors in equal proportions, or in whatever proportion you may consider them deserving of." That was commented upon by Mr. *Jessel* as shewing that the *expressio unius* in one case was to be taken as an exclusion of other cases, but I do not think that is the true interpretation of the words. Then he goes on to say, "after arranging

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for the due payment of the foregoing in whatever manner you may think best, I wish the remainder of my property to go to yourself and to my brothers *Thomas*, *James*, and *John* in equal proportions, and to be sold or not as you may consider best for the benefit of all parties. I do not wish you to act strictly to the foregoing instructions, but leave it entirely to your own good judgment to do as you think I would if living." So far it might be said that that had reference only to the management of the property, but then follow these words, "and as the parties are deserving, and as it is not my wish that you should say anything about this document, there cannot be any fault found with you by any of the parties should you not act in strict accordance with it." What can that mean but this: "I do not intend to fetter you by these instructions. I desire you not to produce them. I wish to give nobody any control or power over you. I wish to leave you entirely to your own discretion as to whether you think the parties to be or not to be deserving." The character of that instrument appears to me materially to assist the view which I have taken of the evidence that Mr. *Grogan* gives with respect to the whole transaction between the testator and himself, namely, that the testator said to him, "You, Mr. *Grogan*, are to have the whole of my property." And when questioned as to whether that was right, he said, "I will not have it in any other way; you shall have the whole of my property;" then telling him that he would find the will and the letter with it, but purposely saying nothing whatever about the contents of the will or of the letter, because he knew that in that letter he had left it to Mr. *Grogan* to act entirely as he thought fit as his *alter ego*, and to give to the parties as he thought they deserved.

It appears to me, therefore, my Lords, that the judgment of the Court of Appeal in *Ireland* was a correct judgment, and that it properly reversed the anterior decision which had been come to by the Lord Chancellor, and it is a decision which I should advise your Lordships to affirm, and I think that, under all the circumstances, it should be affirmed with costs.

Lord Westbury:—

My Lords, I should not deem it necessary to add anything to what has fallen from my noble and learned friend, were it not for

the feeling of respect which I entertain for the able arguments of the counsel for the Appellant.

My Lords, the jurisdiction which is invoked here by the Appellant is founded altogether on personal fraud. It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. Now, being a jurisdiction founded on personal fraud, it is incumbent on the Court to see that a fraud, a *malus animus*, is proved by the clearest and most indisputable evidence. It is impossible to supply presumption in the place of proof, nor are you warranted in deriving those conclusions in the absence of direct proof, for the purpose of affixing the criminal character of fraud, which you might by possibility derive in a case of simple contract. The Court of Equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the *Statute of Frauds*, and in this manner, also, it deals with the *Statute of Wills*. And if an individual on his deathbed, or at any other time, is persuaded by his heir-at-law, or his next of kin, to abstain from making a will, or if the same individual, having made a will, communicates the disposition to the person on the face of the will benefited by that disposition, but, at the same time, says to that individual that he has a purpose to answer which he has not expressed in the will, but which he depends on the disponee to carry into effect, and the disponee assents to it, either expressly, or by any mode of action which the disponee knows must give to the testator the impression and belief that he fully assents to the request, then, undoubtedly, the heir-at-law in the one case, and the disponee in the other, will be converted into trustees, simply on the principle that an individual shall not be benefited by his own personal fraud. You are obliged, therefore, to shew most clearly and distinctly that the person you wish to convert into a trustee acted *malo animo*. You

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must shew distinctly that he knew that the testator or the intestate was beguiled and deceived by his conduct. If you are not in a condition to affirm that without any misgiving, or possibility of mistake, you are not warranted in affixing on the individual the *delictum* of fraud, which you must do before you convert him into a trustee.

Now are there any *indicia* of fraud in this case? The first thing which it is incumbent on the party to make out is, not only that the testator communicated to Mr. *Grogan* that the letter contained some directions touching the ownership of his property different from what appear on the face of the will, but you must also prove that the testator considered that Mr. *Grogan* had accepted the obligation, and had made a promise to carry those different dispositions into effect. But, when we examine the evidence, it amounts merely to this, that Mr. *Grogan*, like an honest man, at first expressed his surprise, and even remonstrated with the testator as to the disposition which he had made. The testator is not represented as telling Mr. *Grogan*, "That disposition is not the real one, the real disposition is contained in the letter." But the testator asserts that he will have no other disposition made of his property; and the meaning of that is very clearly shewn (as was observed by my noble and learned friend) when you connect the letter with the will, from which it is plain that the testator meant, "I will not have any other disposition than that; I place you in my shoes, and give you the absolute dominion over my property which I have myself, and leave you at liberty to carry out my present wishes, or not to carry them out, according to your discretion, which shall be absolute and uncontrolled." Even if that letter had been communicated to Mr. *Grogan* there would have been no trust in favour of any individual. But there is nothing in the evidence that amounts to more than this—that the testator told him, "I will have my property disposed of in the way in which I tell you I have disposed of it by will; and you will find a letter in connection with my will." And when we come to the evidence, there is nothing to be extracted from that evidence that can be carried beyond this,—that the individual to whom those words were addressed supposed, and naturally supposed, that the letter would have some connection with the property. My Lords, it is

impossible to hold that that amounts to a distinct promise, the breach of which would constitute a fraud; for you cannot constitute a fraud in this matter unless you find that there is a distinct and positive promise, the non-fulfilment of which brands the party with disgrace as having personally imposed on the testator. There is nothing, I repeat, in the circumstances of this case that would warrant us in arriving at that conclusion; and there is nothing, therefore, to justify the Appellant in coming here to fasten that personal imputation upon the Respondent, and then to derive from that a conclusion of trust in favour of himself.

I am sorry that I am compelled to accede to the motion of my noble and learned friend, that this appeal should be dismissed with costs; but it is absolutely necessary that it should be so, because it is a case where a right of property is claimed, and is sought to be enforced through the medium of fastening an imputation of fraud, for which there is no justification. Cases of that nature eminently deserve to be dismissed with costs, and such, I apprehend, will be the conclusion to which the House will come in this case.

Lord Colonsay concurred.

Lord Cairns:—

My Lords, I entirely concur in the motion which has been made, and in the observations that have been made by those of your Lordships who have spoken.

Order affirmed, and appeal dismissed with costs.

Lords' Journals, April 23rd, 1869.

Solicitors for the Appellant: *Capron, Dalton, & Hitchins.*
Solicitors for the Respondent: *G. & P. Eyre & Co.*

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Feb. 23;
June 11.

CHARLES JAMES PARTINGTON . . Plaintiff in Error;

AND

The ATTORNEY-GENERAL. . . . Defendant in Error.

Stamp Duty—Property in England to be distributed Abroad.

5 Ch. 3.6
2 R. Ch. 395

By the law of *England*, if a married woman becomes entitled to the property of a deceased relative situated in *England*, and her husband takes no step to reduce her rights into possession, and she dies, and her husband does not take out administration to her and he dies, the child of these married persons must take out two administrations, one to his father, the other to his mother, on each of which, as on a distinct devolution of property, duty is payable to the Crown.

If this child is domiciled in a foreign state, where his parents were also domiciled, and empowers a person in *England* to take out administration for him, the same course must, under the same circumstances, be pursued, even though the property, when obtained, is to be distributed in the foreign state, where the law might not require this double authority of administration. (*Diss.* Lord *Westbury.*)

Where such property, no next of kin appearing, had been taken possession of by the Solicitor to the Treasury, who had paid off all the debts of the intestate, and then paid over the balance to the Crown, and, after some years, the claim of the next of kin was established, and the Solicitor of the Treasury ordered to pay over the principal amount, with interest, to the next of kin, the interest as well as the principal is chargeable with duty: the rule being that whatever is recoverable by virtue of the letters of administration is so chargeable, and the interest was so recoverable, being, in fact, part of the estate for which administration was granted.

Observations upon *Gutteridge* v. *Stilwell* (1), and *Loy* v. *Duckett* (2).

THIS was a special case, stated without pleadings, for the opinion of the Court of Exchequer, under the 22 & 23 Vict. c. 21, s. 10.

In 1819 Mrs. *Mary Shard* died in *England*, intestate, leaving a considerable personal estate situated here. No one appeared to administer her estate, and Mr. *Maule*, then the Solicitor to the Treasury, took out letters of administration for that purpose. The next of kin to the deceased was Mrs. *Isabel Cook*, the wife of Mr. *Ellis Cook*, both of whom had always been domiciled in the *United States*. Mrs. *Isabel Cook* died in 1825. She had not taken out letters of administration to Mrs. *Shard*. Her husband did not

(1) 1 My. & K. 486. (2) 1 Cr. & Ph. 305.

adopt any course to reduce into possession the property to which his wife had thus become entitled, nor take out letters of administration to his wife. He died in 1830. After his death, his children applied to Mr. *Partington* to take proceedings against the Solicitor to the Treasury, to recover from him the property which had belonged to Mrs. *Shard*, and which they claimed under their mother. *James Cook*, the son of *Ellis* and *Isabel Cook*, gave Mr. *Partington* a power of attorney for this purpose, and Mr. *Partington* took out separate letters of administration to the estate, first of *Ellis Cook*, and then of *Isabel Cook*. Each grant was dated on the 22nd of July, 1855, and the form of each was as follows:—"We do grant full power and authority to you to administer and faithfully dispose of the said goods, chattels, and credits which, whilst living, and at the time of his death, did in any way belong to his estate, and we constitute you administrator of all and singular the goods, chattels, and credits of the said deceased, for the use and benefit of the said *James Cook*, now residing at *Brandon*, in *Vermont*, in *North America*, and until he shall apply for and obtain letters of administration of the goods of the said deceased to be granted to him." In the grant relating to the mother's estate, the concluding words were:—"For the use, &c. of *James Cook*, now residing in *Vermont*, in *North America*, one of the natural and lawful children of the said *Isabel Cook*, deceased, and until he shall duly apply for and obtain letters of administration of the goods of the said *Ellis Cook* to be granted to him, the said *Ellis Cook* having survived the said deceased, but died without having taken upon him letters of administration of her goods, chattels, and credits." Mr. *Partington* then instituted an administration suit in Chancery against Mr. *Reynolds* (who had in the meantime succeeded Mr. *Maule* as Solicitor to the Treasury), and the Court, having found *James Cook* to be the next of kin, declared Mr. *Reynolds* to be chargeable with the principal sums of the assets of Mrs. *Shard*, and also with the accretions, at the rate of four per cent. interest on such principal sums, since they had come into the hands of the Solicitor to the Treasury. The letters of administration had been at first obtained as upon assets of a nominal amount, but when the principal sums and the accretions had been ascertained, *Partington* applied to the Commissioners of Inland

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Revenue to put the *ad valorem* stamp duty on the letters of administration.

The Commissioners claimed that stamp duty should be calculated on a value including all accretions from the death of *Isabel Cook* to the date of the administration, viz. the 23rd of July, 1855, and also claimed that the grant of the administration for the effects of the late *Ellis Cook*, who survived his wife, should be stamped at the same rate.

The questions stated for the opinion of the Court of Exchequer were, first, what probate duty was payable in respect of *Isabel Cook's* estate? and, secondly, whether any and what probate duty was payable in respect of the estate of *Ellis Cook*. The Court of Exchequer held (1) that probate duty was payable, not only on the principal of *Isabel Cook's* estate, but on the accretions thereon, up to July, 1855, but that no duty was payable, in respect of these sums, upon the estate of *Ellis Cook*. This judgment was appealed against by both parties, *Partington* insisting that no duty was payable on the accretions, while it was contended for the Crown, not only that duty was payable in respect of them, but also that the estate of *Ellis Cook* was, equally with that of his wife, chargeable with duty. The Court of Exchequer Chamber gave judgment for the Crown on both points (2). The present proceeding in Error was then brought.

Mr. *Cotton*, Q.C., and Mr. *Holl*, for the Plaintiff in Error:—

The first question really is, whether an *ad valorem* duty is chargeable on each of the two grants of administration. The decision of the Court of Exchequer Chamber in the affirmative cannot be supported. The duty is chargeable only on that property which the administrator takes as the property of the deceased to whom he administers. Where property is taken not as property of the deceased, but only as property which he is to administer as trustee, the new administrator is not liable to pay duty on it. The property here was the property of the wife, *Isabel Cook;* it was not that of her husband *Ellis Cook*, for it had never been by him reduced into possession, and the only duty payable upon it was payable in respect of *Isabel Cook's* interest. [LORD CAIRNS:—Would the receipt

(1) 1 H. & C. 457. 10 Jur. N.S. 617 (2) 3 H. & C. 193.

of the representative of the wife have been a sufficient discharge to the holder of the fund?] It would. [LORD WESTBURY:—That is, a receipt by the administrator of the wife without the concurrence of the administrator of the husband?] It is believed that it would be sufficient, at all events in *America*, and it was there that the fund was to be distributed. The law of *America* governed its distribution. In this country the concurrence of the husband, or of his representative, might have been required, but even then, as the real title to the property was the title of the wife, that would only have been required as a consequence of the changed practice of the Court of Probate, which cannot, however, affect the law and the legal rights of the parties. In a case of this kind the former practice of the Probate Court would have been to grant probate to the next of kin of the wife, but that practice is now changed, *Fielder* v. *Hanger* (1), and administration is now granted to the legal representative of the husband. But the object in each instance is the same, that of satisfying the Court that the husband, or his representative, does not set up any opposition to the grant. But even that cannot affect a case where the direct title to the property is in the wife, and where, which is still more important, the property is only to be collected here, but is to be distributed according to the rules of a different system of law, the law of the domicile of the parties beneficially entitled. The decree of the Vice-Chancellor declares who is entitled to the fund, and authorizes the administrator, "as the legal personal representative of *Isabel Cook*," the wife, to receive it. On his receiving it, his duty was at once to transmit it to *America*, where it would be distributed according to American law. [LORD CAIRNS:—But in the special case it is stated that *Partington* went to *America* and paid the money to *James Cook*, who gave him a release so far as regarded *Isabel Cook's* estate, and also as the administrator of *Ellis Cook*, *James Cook* having taken out administration there for the purpose of administering *Ellis Cook's* estate in that country.] But, under the Act, the duty is to be paid only on that estate in respect of the property in which the administration is granted. That was the property, the personal estate of the wife. [LORD WESTBURY:—You mean to say that the distribution belongs to

(1) 3 Hag. Ecc. Rep. 769

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the law of *America*, and therefore we have no right to treat *Ellis Cook* as entitled under our law, and consequently no right to charge his administrator with duty in respect of his title under our law?] That is so. *Enohin* v. *Wylie* (1) distinctly supports the doctrine now contended for, that the country of the domicile is to decide all questions of administration. That was a case in which the question turned on the construction of a will, but the principle is exactly the same, namely, that as the property is to be distributed in the foreign country, it must be distributed according to the law of that country, and of course all the incidents to its distribution must be governed by the law of that country. [THE LORD CHANCELLOR:—The argument really comes to this, that it was a mistake to take out administration here to the husband *Ellis Cook*, but the administrator ought to have gone first to the American Court, and merely have asked the assistance of the Probate Court to collect *Isabel's* estate here, that he might transmit it to *America* for distribution.] That is the contention. In fact it was not given to *Partington* as administrator, but only as attorney of *James Cook*, who was the representative of his mother. [LORD WESTBURY:—Your argument is, that the representative of the husband merely came on the stage as a consenting party.] Exactly; and, till the case of *Fielder* v. *Hanger* (2), the practice of the Court in such cases was to grant administration only to the representative of the wife. The husband in this case did not take anything by virtue of the grant of administration here, but came in only by virtue of the distribution which was to take place in *America*, and his character and position are to be governed entirely by American law. [THE LORD CHANCELLOR:—We have nothing to do in this appeal with what the Probate Court ought to have done—the sole question for us is what is the stamp that ought to have been impressed on these grants of probate.] The mistake in taking out two grants of administration cannot affect the property itself, so as to make that property liable to duty here as if it was to be distributed here, when in truth it cannot be distributed here, but must be distributed in *America*. *Gutteridge* v. *Stilwell* (3) shews that it must be treated as the wife's property alone. In that case there was a fund stand-

(1) 10 H. L. C. 1. (2) 3 Hag. Ecc. Rep. 769.
(3) 1 My. & K. 486.

ing in Court to the separate account of a married woman; her husband survived her, but died before obtaining letters to administer her estate: the fund was ordered to be paid to the wife's legal representative, though he had not obtained administration to the husband's estate. The Master of the Rolls had thought that that fact rendered the title of the administrator incomplete, but Lord Chancellor *Brougham* reversed his decision, saying "it was impossible for the Court to look beyond the admitted personal representative." The observations made upon that case by Lord Chancellor *Cottenham* in *Loy* v. *Duckett* (1) do not really affect the decision, for they proceed on the assumption that it is the duty of the Court to look to the administration of the estate, whereas the principle on which Lord *Brougham* acted had, long before, in *Jones* v. *Goodchild* (2), been expressly declared and acted on, the legal title of the executor being the only thing regarded.

The second point arises on the 55 Geo. 3, c. 184, namely, whether the interest which has become due on the property, the accretions on it, are legally subject to *ad valorem* duty? The 38th section expressly requires, as a preliminary to the grant of probate or letters of administration, a statement of the value of the estate of the deceased exclusive of what he was entitled to as a trustee. No such statement could possibly include interest accruing, as in this case, by the default of some person who, in the meantime, had possessed himself of the property. Here the decree against the Solicitor of the Treasury had been made, as in *Re Dewell, Edgar* v. *Reynolds* (3), on account of neglect of duty. The interest thus ordered to be paid was in the nature of damages, and could not be made subject to *ad valorem* duty as part of the estate. Besides, the title of the executor or administrator relates back to the death of the testator or intestate, and what he is entitled to, as constituting the estate itself, is to be determined at that time: *Foster* v. *Bates* (4). The property on which the duty is chargeable is that which would have come into his hands at the moment of the death could he then have received it. In *The Attorney-General* v. *Hope* (5), and *The Attorney-General* v. *Dimond* (6), it was held that even where the

(1) 1 Cr. & Ph. 305, 312, 313.
(2) 3 P. Wms. 34.
(3) 4 Drew. 269.
(4) 12 M. & W. 226.
(5) 2 Cl. & F. 84.
(6) 1 C. & J. 356.

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testator died in this country, but was possessed of property abroad, that property being brought into this country afterwards was not chargeable with duty. *Doe* d. *Richards* v. *Evans* (1) really does not affect this case, for there it was the estate itself which had improved in value before the grant of letters of administration, and which on that account was charged with *ad valorem* duty; nor is *The Attorney-General* v. *Brunning* (2) applicable here, for that only decided that the purchase-money agreed to be given for an estate was to be considered, for the purposes of probate duty, as the estate itself.

The *Attorney-General* (Sir *R. P. Collier*), and Sir *Roundell Palmer*, Q.C. (Mr. *Crompton Hutton* was with them), for the Crown:—

As to the second point, the cases of *The Attorney-General* v. *Hope* (3), and *The Attorney-General* v. *Dimond* (4), do not apply here in favour of the Appellant. They only determine that as probate is not granted in this country in respect of property not in this country, consequently probate duty is not claimed here in respect of such property. But an increase in the value of property here, occurring before the grant of letters of administration, is the subject of duty: *Doe* d. *Richards* v. *Evans* (1); *The Attorney-General* v. *Brunning* (2). The duty is payable in respect of what may be recovered under the authority of the probate. The interest was so recovered by *Partington*, and duty therefore became payable upon it. If *Partington* had sued the Solicitor of the Treasury for this interest, and had shewn that he was suing for a greater value than was covered by the *ad valorem* stamp of his letters of administration, he could not have recovered: *Hunt* v. *Stevens* (5). That rule was acted on in Chancery in the case of *Christian* v. *The Commissioners of Charitable Donations* (6), where a stop order was refused to a man who had not procured letters of administration sufficiently stamped.

As to the other point: The two administrations were absolutely necessary: *Ex parte Crause* (7). *Partington* acted on a power of

(1) 10 Q. B. 476.
(2) 8 H. L. C. 243.
(3) 2 Cl. & F. 84.
(4) 1 C. & J. 356.
(5) 3 Taunt. 113.
(6) 12 Sim. 264.
(7) 1 Sw. & Tr. 146.

attorney which made him the representative of *James Cook*. But *James Cook* claimed to represent the interests of his father and of his mother. The property was originally that of his mother. His father had never reduced it into possession, and at the time of her death did not hold it *jure mariti*, but only had a title to it as representative of his deceased wife. Before he could take possession of it some legal act was necessary to be performed. It may be true (though it is not admitted), that by the law of *James Cook's* domicile *James Cook* could claim it directly as the representative of his mother, without taking notice of his father's intervening title; but that could not affect his title to claim property in this country. No legal title to the property had been made out—that title was required to be established. How the property would be distributed when it was once recovered was not material; the title to recover it was to be made out. Though the law of this country would not interfere with the distribution of the property after it had been recovered, and when it was to be distributed abroad, it would act on its own rules as to property in this country which was sought to be recovered here, *Enohin* v. *Wylie* (1); and that case declared that parties entitled to insist on the authority of the Courts of their domicile might so conduct themselves as to give to the English Courts authority and jurisdiction to construe a will and administer the estate so far as funds and persons in this country were concerned. They had done so here. Even when a foreigner dies on board a ship coming to this country, and is possessed of property here, the Court of Probate will grant administration of his effects: *In re Wyckoff* (2). The statute requiring payment of duty on all property to be recovered by virtue of the letters of administration, it can be of no importance to what country the person who is to receive the property belongs. No doubt the money of *Isabel Cook*, when actually received by her representative, might have been held by him in trust for her husband, but her husband never having done anything to reduce it into possession, at the time of his death his title to it was only as the person entitled to the administration of his wife's estate, so that when he died and his personal representative claimed it, there occurred, in fact, two devolutions. That was exemplified in the case of *Shadbolt* v. *Thorn-*

(1) 10 H. L. C. 1. (2) 3 Sw. & Tr. 20.

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ton (1), where the result of that second devolution actually was to give to charities property which was originally real estate, but which, through the happening of two devolutions, assumed the character of personalty. That this property was essentially that of *Isabel Cook* is shewn by the case of *The Attorney-General* v. *Malkin* (2). There, a sum of money was bequeathed to a married woman for life, with a power to appoint by will to such persons as she might think fit, and in default of such appointment, "to and for the benefit of her executors and administrators." She died without making any appointment, and her husband, who survived her, died without having administered to her estate. It was held that his personal representatives took the fund not beneficially, nor in trust for his next of kin, but as part of her estate.

The two administrations being therefore necessary in order to make the title of the Appellant perfect, he is bound to pay duty on each of them.

Mr. *Cotton* replied.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, this writ of error is brought in respect of a judgment of the Court of Exchequer Chamber, which in part affirmed, and in part reversed, a previous judgment of the Court of Exchequer, the question being one with reference to the duty payable on certain letters of administration under circumstances which I shall presently refer to. There were two points originally raised, namely, first, whether or not, considerable delay having occurred between the death of the intestate and the taking out of the letters of administration, the duty should be chargeable upon the accretions of interest which had occurred in the interval; and the second point, being one of more importance, and requiring more consideration, namely, whether or not a double duty was payable, there having been a lady entitled, in the first instance, to administer to the intestate, and entitled also to the beneficial interest in the property of the intestate, and she having predeceased her husband, and the husband also having died before taking out letters of administration to her, and before any were taken out by Mr. *Partington*.

(1) 17 Sim. 49. (2) 2 Phillips, 64.

With regard to the first point which was here raised, there was no difference of opinion on the part of any of your Lordships, namely, with respect to the duty being chargeable upon the accretions of interest. Upon that point, we all entirely concurred in the view which had been taken by both the Courts below, that the duty was so chargeable upon the accretions of interest. I do not go into the reasons for that decision, because they were sufficiently explained in the judgments in those Courts. To those judgments I adhere, and for the reasons which are there assigned for the decision.

With regard to the other point the facts are very short:—[His Lordship stated them.]

Now, it is important, as it seems to me, to see the exact form in which those letters of administration were granted. They were in the form used in the course of procedure in the Ecclesiastical Courts, because it is now well known, and it is so laid down in *Williams* on Executors (1), and perfectly in consonance with all the authorities, that the course now in the Ecclesiastical Court is, in all cases where the wife has predeceased her husband, to grant to the representative of the husband alone, letters of administration to the wife. There was a time when the Ecclesiastical Courts thought themselves justified, and even bound, to give letters of administration to the next of kin of the wife; but it was determined that the next of kin of the wife in that case, holding such letters of administration, were only trustees for the administrator of the husband, and it was finally concluded (I think in the time of Sir *John Nichol*) that the right and proper course in all such cases was to grant the letters of administration only to the person who invested himself with the character of administrator of the husband. That course was followed in this case, which appears by the form of the letters of administration. [His Lordship stated the form in each case.] So that in those letters the administration is not only granted to *Partington* because he had already clothed himself with the character of representative of *Ellis Cook*, but, in noticing that he is acting as attorney to *James Cook*, there is this reservation made of *James Cook's* right, that he is to have the benefit of coming in and claiming as the representative of *Ellis*

(1) Pt. I. Bk. V. c. II. s. 1, p. 360, 5th Ed.

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Cook if so minded, but not until he has clothed himself with the character of the representative of *Ellis Cook*.

That being so, it appears to me that if this had been a case in which the parties were residing and domiciled in this country, no question could have arisen about the payment of the duty upon administration. In regard to the administration of *Ellis Cook*, the husband, the administration is, of course, taken out in respect of all his property. His property at that time included his beneficial interest in the estate of his deceased wife; and, of course, therefore, the stamp duty payable upon it, being the stamp duty that must be paid upon all that was his at the time of his decease, would include that interest which he took in the estate of his predeceased wife.

Then with regard to *Isabel Cook's* estate, the representative of the husband, who has clothed himself with that character, and who applies for administration to her, must pay duty upon all which was hers at the time of her decease. In that way it appears to me to be plain, beyond all dispute, that a double duty must be payable. Nor, as was observed in the Courts below, is there any injustice in such a conclusion, because had *Ellis Cook* done that which it was perfectly competent to him to do in his lifetime, namely, had he applied for letters of administration to his wife, he, of course, would have had to pay the duty in respect of her estate at her decease, and then when he himself died those who represented him would have had to do exactly the same thing which they are now called upon to do, namely, they would have had to pay duty upon his estate, which, of course, would include (unless he had spent it in the interval) the property which he had so derived from his deceased wife.

We were referred to one case in which Lord *Brougham* thought it proper that payment should be made to the administrator of the deceased wife without having any regard whatever to the position of those who were entitled to represent the interest of the deceased husband. It was the case of *Gutteridge* v. *Stilwell* (1), in which Sir *John Leach* had refused to direct any payment to be made to the representative of the deceased wife except in the presence of the representative of the deceased husband. Lord *Cottenham*, on

(1) 1 My. & K. 486.

having that case called to his attention in the case of *Loy* v. *Duckett* (1), intimated his opinion that the view of Sir *John Leach* was the preferable view, and that the payment to the representative of the wife alone ought not to have been so made.

But, without considering that question at all, it appears to me that the administration was so granted upon the grounds that I have stated, namely, that the person entitled to administer to the deceased wife should be the person who had the right and interest in the property, and that that would be the administrator of the deceased husband. Certainly it is not a course of proceeding which it appears to me we are called upon or justified in finding any fault with, as having thrown improperly any burden upon those parties who made application for, and acquired in the usual manner, the representation of the estate of *Isabel Cook*. The Ecclesiastical Court would not have granted it to them unless they had first of all clothed themselves with the character of the representatives of *Ellis Cook*. That being so, it became necessary for them to take out administration to *Ellis Cook*, and they did take it out, and that being done, the duty was charged in the usual mode in which it ought to be charged in a case of this description.

But then there arises in this case the circumstance of the parties having been domiciled in *America*. I have been favoured by the kindness of one of your Lordships (Lord *Westbury*) with the view which was partly thrown out in the course of the argument by that noble and learned Lord upon this part of the case, which created considerable doubt in his mind. He doubted whether or not, under the circumstances of the case, the duty ought to have been payable in respect of the interest which *Ellis* the father acquired by surviving his deceased wife, and upon this ground, namely, that *Ellis* the father being domiciled in the *United States of America*, and all the parties interested in the estate being also there domiciled, when the payment was directed by Vice-Chancellor *Kindersley* in this case to be made by the Solicitor of the Treasury to Mr. *Partington*, after Mr. *Partington* had clothed himself with the character of representative of *Isabel Cook*, and had made out his title, in that character, to the fund, the matter was placed in this position, that he, as the representative of *Isabel Cook*, would be entitled to re-

(1) 1 Cr. & P. 305, 312, 313.

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ceive the fund, and to carry with him that fund and to distribute it according to the rules and regulations of the country where the parties interested in it as beneficiaries were domiciled. Under such circumstances it appeared to my noble and learned friend that the Ecclesiastical Court in this country had nothing to do with the administration of the property, and that the property having to be administered in *America*, the course of proceeding ought to have been simply to make payment to *Partington*, as the representative of *Isabel Cook*, leaving him afterwards to distribute the property as the law of the *United States*, the country of the domicile of the parties beneficially interested, would require.

Now, whatever weight there may be in that observation, as to what ought to have been the course of procedure of the Ecclesiastical Court, namely, whether or not it might not have been proper and reasonable for that Ecclesiastical Court, if duly informed of all the circumstances, to grant to *Partington* letters of administration to *Isabel Cook* without requiring previous letters of administration to be taken out to *Ellis Cook*, I think that those letters having been taken out, the parties having, and I think with reason, chosen to adopt that course, it is not for your Lordships to say that there is error in the judgments which have been pronounced. The sole question before us being whether or not, certain letters of administration having been taken out both to the one party and to the other, the proper amount of duty must not be paid in respect of the property to which both the one and the other are entitled. It is true that where it is made out plainly in the Ecclesiastical Court that the husband has no right or interest whatever in the wife's estate (a case which is not of very uncommon occurrence where, under a marriage settlement, the property passes direct to the children and the husband takes no interest in it) the Court does not require, according to its rule in making the grant of administration, that the grant should be made to the representative of the husband, the husband taking no interest. But it would not be so where he did take an interest in the property. I have thought very much upon the subject in consequence of having been furnished with my noble and learned friend's view upon that point, and have felt that it was a matter deserving of very deep and anxious consideration. It has occurred to me that it might have

been possible here for the representative of *Ellis Cook* in *America*, one who had taken out representation to *Ellis Cook* (for it appears from the proceedings that representation was taken out in the *United States* to *Ellis Cook*), to come over here and satisfy the Ecclesiastical Court that, being the representative of *Ellis Cook* in *America*, he was entitled in that right to ask for letters of administration to *Isabel Cook* to be granted to him. I need not farther follow up that supposition, because what has been *de facto* done is this, that Mr. *Partington*, acting according to the best advice that could be obtained, feeling the difficulty and doubt which might have arisen if he had so made an attempt to take out administration in that course of proceeding, has not done so. He thought it expedient to take out administration in the usual mode in which it is granted, and the only mode in which it is granted, in this country, unless it can be shewn either that the husband's representative has no interest, or that some other person has an interest which would enable him to take out representation to the wife without previously taking out representation to the husband. Feeling that there might be difficulties in not adopting the usual course, he has adopted that course which is usual and regular with regard to the administration of property situated within the jurisdiction of the Ecclesiastical Court, and therefore, the Court having followed the usual course, it appears that all that your Lordships can say upon the present occasion is, that the duty upon these several letters of administration must be the duty payable in all ordinary cases in which letters of administration are taken out; namely, that there must be full payment of duty upon the husband's estate, it being in respect of that estate that the letters are taken out. And so, of course, when the representative of the husband approaches the Court requiring administration to the wife, the duty must be paid upon the same principle, namely, full duty upon all that which at the time of the wife's decease was her property, upon which the charge as imposed by the Legislature falls. It does not appear to me that there is any ground for saying that any mistake or misconception has arisen. The case is simply this, that *Partington* having had two courses open to him, as to one of which I cannot pronounce decisively, because I cannot say what might have been the case if he had come forward in the other form, namely, as a foreign repre-

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sentative claiming directly the estate of *Isabel Cook*, but he having taken the ordinary course, it appears to me that it necessarily follows that the duty payable upon the property which he so acquired is payable in the present instance upon each estate.

I come, therefore, to the conclusion that in this case your Lordships ought to affirm the decision of the Court of Exchequer Chamber, and, consequently, with costs.

LORD CHELMSFORD:—

My Lords, I agree with my noble and learned friend on the woolsack upon both the questions raised by the special case.

With respect to the liability to the full duty upon both the administrations taken out by the Appellant, it was admitted by his learned Counsel that if the question had arisen with respect to subjects of this country no doubt would have existed as to the double duty being payable. But it was contended, that as *Isabel Cook* and her husband *Ellis Cook* were domiciled *Americans*, it was not necessary to take out administration to *Ellis Cook* in order to obtain administration to *Isabel Cook;* that the husband was not an interested party; that the wife's administrator might give a sufficient receipt and discharge; and that the whole of the duty of the administrator was to remit the money received by him under the administration to *America* to be distributed there to the persons entitled.

I must confess my inability to follow this reasoning, or to understand how the question of domicile can enter into the consideration of the grant of letters of administration in this country. If it could, I do not see, in the absence of evidence upon the subject, how we can assume that the law of *America* differs from our law as to the right of succession to the estate in question. Upon the facts stated in the special case, it appears that the power of attorney given by *James Cook* to the Appellant was to take out administration to the estates of *Ellis Cook* and *Isabel Cook* respectively. There is nothing stated in the special case which would render this course unnecessary. It is not shewn that upon *Isabel Cook's* dying intestate her husband, surviving her, would have been entitled to his wife's interest in Mrs. *Shard's* estate without taking out letters of administration. Or that upon his death without

having obtained administration to his wife, the right to this administration, and to the property to which it would give a title, would not pass to his personal representative. If administration had been granted to *Isabel Cook* alone her administrator would have held the property in trust for the representatives of *Ellis Cook*. Therefore the administration to *Ellis Cook* was not a mere formal proceeding, much less an unnecessary act, but it was an essential step in order to obtain a title to the property of which *Isabel Cook* died intestate.

In the case cited, *The Goods of Jane Elizabeth Crause* (1), it was held that where the husband has survived his wife and died intestate without administering to her estate, his next of kin must constitute themselves his legal personal representatives before they could have any claim to administer his estate. In that case, the Judge Ordinary quoted the words of Sir *John Nichol* in a former case, where that learned Judge of the Prerogative Court said: "On the principle that the grant ought to follow the interest, and that the whole interest is vested in the husband's representatives, I shall decree this grant. I should have done the same if the husband had not taken out administration, unless it could be shewn that he had no interest, but that the property belonged to the wife's next of kin."

But it was said, that even assuming two administrations to have been necessary, yet that one duty alone ought to be payable, because they were administrations to one and the same property. But although the property is the same, the right to the property claimed by the administrator was different. The administrator of *Isabel Cook* represents her right to the estate of Mrs. *Shard* as next of kin; the administrator of *Ellis Cook* represents his as entitled, *jure mariti*, to his wife's property. If *Ellis Cook* had taken out administration to his wife and afterwards died intestate, there would, of course, have been two probate duties payable in respect of the same property. And what difference can there be in principle between the duties payable under the supposed circumstances, and those which are in question in this case, where in order to reach the property it was necessary to take out two administrations, simultaneously to vest distinct and different rights to that property in the same administrator?

(1) 1 Sw. & Tr. 146.

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With respect to the question whether the probate duty payable ought to have been calculated on the value of the estate at the time of the death of *Isabel Cook* or upon the increased value it had acquired at the time of the grant of the letters of administration, I have no difficulty in agreeing with the judgment of both the Courts of Exchequer and of Exchequer Chamber. The Appellant's counsel contended that the duty is assessable upon the estate and effects for or in respect of which the administration is granted, and that the administration granted is of the goods, chattels, and credits of the intestate at the time of his or her death. When the grants of the letters of administration were made, the estate to be administered had increased by the accumulation of interest accruing since the death of the intestate. The estates of the intestates at the time of their deaths, were, however, interest-bearing estates, and what the administrator became entitled to was, those estates ascertained to have become of a certain value. I consider this question to have been settled by the case of *Doe* d. *Richards* v. *Evans* (1), because the counsel there having quoted a passage from *Gwynne* on the Law relating to the Duties on Probates and Letters of Administration (2), which states "that the Commissioners of Stamps require all rents, interest, and dividends, from the death of the testator or intestate to the date of the probate on letters of administration, to be included in the estimate upon which duty is to be paid, but that there had been no judicial decision upon the point, and that counsel of great eminence had held a different opinion." Lord *Denman* said, "The improvement is inseparably part of that which the deceased had, and of which administration was granted."

I think the judgment of the Exchequer Chamber ought to be affirmed.

LORD WESTBURY:—

My Lords, the facts of this case are few and simple:—[His Lordship stated them.]

On this order being made in the Court of Chancery directing the payment to *Partington* "as the legal personal representative of the said *Isabel Cook*," the Crown has claimed a double *ad valorem* duty—that is to say, it has required that the letters of administration to

(1) 10 Q. B. 476. (2) 3 Edit. (1841) p. 25.

Isabel should be stamped with an *ad valorem* duty to the extent of the estate directed to be paid to *Isabel's* personal representative, and it has required the same amount of duty to be paid on the letters of administration of the estate of *Ellis Cook*.

It is contended for the Crown that there have been two distinct devolutions of the beneficial ownership—one on the death of *Isabel*, and the other on the death of *Ellis;* and that two administrations are therefore necessary, as if there were two distinct estates.

In the judgment of the Court of Exchequer Chamber, it is said (1): "So, in respect of the letters of administration to the estate of the husband, the stamp duty is equally chargeable, as they are necessary to establish the *devolution of the property* upon *James Cook*, and to entitle him to receive it." The case for the Crown therefore is founded on the transmission of beneficial ownership.

The Crown assumes to follow the estate from the hands of the administrator of *Isabel* into the hands of the administrator of *Ellis*, and claims two duties, upon the ground that the estate is twice distributed or administered in this country under the two administrations. One *ad valorem* duty is claimed in respect of the administration to *Isabel;* but inasmuch as the property when received by the administrator of *Isabel* will (according to the assumption of the Crown) belong beneficially to the estate of *Ellis*, the Crown claims a second *ad valorem* duty in respect of the new character or quality which the same property receives by transmission in the second place, namely, the character of personal estate of *Ellis*. In short, the Stamp Office regards the estate as undergoing two processes of distribution in this country,—first, as the personal estate of *Isabel*, and, secondly, as the personal estate of *Ellis*.

The first duty on the administration to *Isabel* is necessary to enable the administrator of *Isabel* to give a valid discharge to the administrator of Mrs. *Shard;* but there is no ground whatever for claiming the second duty, except the contention that the money, when received by the administrator of *Isabel*, belongs to *Ellis*, and therefore must be distributed as his personal estate. That the beneficial interest in the estate of *Isabel* belongs to *Ellis* is laboriously proved by the Court of Exchequer Chamber, upon the principles of English law, and by the authority of English decisions.

(1) 3 H. & C. 207.

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The answer to this assumption, and the conclusions founded upon it, lies in the fact, that by law neither the personal estate of *Isabel* nor the personal estate of *Ellis* is to be distributed or administered in this country, and that the assumption on which the Crown's claim is founded is untrue both in law and in fact.

The case has been decided in the Court below as if the ownership and distribution of the personal estates of *Isabel* and *Ellis* were to be regulated entirely by the law which would be applicable if *Isabel* and *Ellis* had been domiciled in *England*. The fact that English law and the jurisdiction of English Courts are excluded by the circumstance that the ownership and distribution of the estates of *Isabel* and *Ellis* are governed exclusively by the laws of a foreign country was not adverted to in the judgment of the Court below.

But when regard is had to the law of the domicile, which the Courts here were bound to take notice of, the true grounds for the decision of the case seem to be clear.

Mrs. *Shard*, at her death, was domiciled in this country. The forum for the administration of her estate was therefore in *England*. The personal representative of Mrs. *Shard* is entitled to have such a discharge for the clear residue of the estate paid over by him under the decree as is valid according to the law of the forum of his administration. Consequently, as *Isabel Cook*, the sole next of kin, was dead at the date of the order, it is the right of Mrs. *Shard's* administrator to have a discharge from a personal representative of *Isabel*, constituted in this country. It was therefore necessary to take out letters of administration to *Isabel*, but solely for the purpose of giving a discharge; and for that purpose it was necessary that the letters of administration to *Isabel* should, in conformity with the fiscal law of this country, be stamped with a stamp corresponding to the amount of the estate to be received by virtue of them. So far the right of this country, as the forum of administration of Mrs. *Shard's* estate, clearly extends, but it extends no farther. English law has nothing to do with the distribution of the estate of *Isabel*, or with the regulation of her succession, or the transmission of the beneficial right to her estate; subjects which belong exclusively to the foreign tribunals.

The English law furnishes no other rule than this, that the English letters of administration, which the administrator of Mrs.

Shard has a right to have produced to him, ought to be granted to the person entitled to represent *Isabel* by the law of her domicile. By that law her succession is wholly governed; and, therefore, it follows that the person entitled to represent *Isabel Cook*, and the person beneficially entitled to her personal estate, fall to be ascertained by the law of the *United States*. They are matters foreign to the law of *England*, and to the jurisdiction of her tribunals.

The course that ought to have been adopted by the parties was this, namely, they should have duly constituted a personal representative of *Isabel Cook* in the proper Court in *America*, and such person, by himself or his attorney, should have applied to the Court of Probate in this country for ancillary letters of administration of the estate of *Isabel*. In this mode of proceeding, as has been already observed, no question of the devolution of the beneficial interest in the estate of *Isabel* could have arisen. This course, however, was not taken by the parties, and the judgment of the Court below proceeds on the application to the case of rules of English law, to which it was not subject.

The application being made by Mr. *Partington*, not for an ancillary grant, but for original letters of administration, the Court of Probate in this country acted in conformity with the rules applicable to English administrations. According to English law, if a married woman becomes entitled to receive a sum of money, the husband becomes entitled to it *jure mariti;* but if the wife dies before the husband has received it, the husband, although his beneficial right remains the same, must, in order to receive the money, take out administration to his wife; and if he dies without having done so, it is necessary that letters of administration should be taken out to the wife's estate (for such is still the legal character of the money), but the wife's administrator is only a trustee for the representative of the husband. On this ground, looking at the succession of *Isabel* as a subject for English law to determine, it was supposed to be necessary that letters of administration to *Ellis* should be obtained. Two distinct letters of administration were therefore granted on the same day and to the same person.

For the reasons already given, this mode of proceeding was the result of mistake and misapprehension on the part of Mr. *Parting-*

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ton or his advisers. If the proper course had been taken, no letters of administration to *Ellis*, the husband, were needed in this country.

This mistaken form of proceeding does not affect the justice of the case or the rights of the parties, nor ought the Stamp Office to attempt to avail itself of the form of the application in order to claim a second duty on grounds which are not applicable to the circumstances.

For the claim of the Crown is founded on the assertion that there have been two devolutions of the beneficial interest in the same property—that is, two successions; and the Court of Exchequer Chamber rests its judgment upon this, that by English law *James Cook* would be entitled to the property as administrator of his father, and not as administrator of his mother; and they have put their decision on matters which were *coram non judice*.

There is but one succession of which the English Court could take cognizance, namely, the succession of *Isabel* to Mrs. *Shard*, and this it has done; but as *Isabel* died domiciled abroad, English law has no right to make any inquiry or pronounce any judgment touching the succession to *Isabel*, still less to treat the succession to *Isabel* as governed by its own laws of transmission, and to insist on imposing a tax on the assumed subsequent devolutions of that estate.

The injustice of the claim as against the foreigner is obvious. Even if *Isabel* and *Ellis* had both died domiciled in *England*, the claim of the Crown to double duty would, as appears from the judgment of the Court below and the last reason of the Respondent's case, have rested on the merest technicality. But when, the foreign domicile being adverted to, it becomes clear that the Courts of this country had no power to follow and decide on the alleged transmission of the beneficial interest, it is most unjust to enforce a claim by the Crown founded on the assumption of a jurisdiction which does not belong to its tribunals.

LORD COLONSAY:—

My Lords, when this case was argued at the Bar, I felt no difficulty as to one of the points, namely, that relating to the accretions to the estate of Mrs. *Shard*. But at that time, I certainly did

participate much in the doubts which have been expressed by my noble and learned friend who has last spoken. It appeared to me that there might be a very considerable difference between the case of a wife succeeding to a property, she being a foreigner and dying abroad; and the case of a wife succeeding to a property, she being a domiciled Englishwoman dying here. I did not see very clearly how the Ecclesiastical Court here was entitled to arrive at the conclusion that the succession to the estate of *Isabel Cook* was the same as if she had been a domiciled Englishwoman and had died here. But when I come to consider the rule that prevails in *England* as to the succession in such a case, the party possessed of the property being English, and her property and her domicile here, it appeared to me that the matter comes very much to this:—That when *James Cook*, the representative of *Isabel Cook*, came forward to ask for letters of administration to obtain the property, the Ecclesiastical Court here was entitled to inquire who was the representative of *Isabel Cook*. And then, I do not understand that there is any question as to this—that if it had been inquired into, it would have appeared that there was in that respect no practical distinction between the succession that did occur, and that which would have occurred if the party had been domiciled here. But the consideration that most strongly prevails with me now is that the parties themselves, well and fully advised as they must have been, came forward and claimed letters of administration in regard to both estates—that is, letters of administration with reference to the estate of *Isabel Cook*, and letters of administration with reference to the estate of *Ellis Cook*. Treating the matter in that way, first, as to the letters of administration to *Ellis Cook*, and then as to the letters of administration to *Isabel Cook*, as if tracing *retro*, as it were, the successions that have occurred in the devolutions of this estate, and the parties having taken the benefits, whatever they were, of the course which they adopted, I think we must now treat the matter as one in which the rule that prevails in such cases in the Ecclesiastical Court must be held to prevail here. It may be that, by following a different course, by following the course in *America* pointed out by my noble and learned friend, the parties might have brought about a different result. They may, perhaps, not have taken the course that

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was most beneficial to themselves. I cannot say how that may be. But, at all events, they have not taken that course. They have taken a different course; and we must deal with the case with reference to the course that has been taken; and viewing it in that light I cannot but concur in the judgment which has been proposed by my noble and learned friend on the woolsack.

LORD CAIRNS:—

2 App Cas 382

My Lords, upon one part of this case I think there is no difference of opinion between any of your Lordships—I mean that with regard to the interest. The interest is clearly payable as damages or compensation for the withholding of the principal. Whoever is entitled to the principal is entitled also to the interest as an accretion. It merges into and becomes part of the sum which has to be paid; and the whole taken together becomes the estate in respect of which the administration is granted.

On the other part of the case I should be far from saying, especially after what has fallen from my noble and learned friend opposite, that no doubt can be entertained. I have had an opportunity, through his kindness, of considering very carefully the strong and powerful arguments which he has addressed to your Lordships; but I am bound to say that I myself have arrived, without hesitation, at the conclusion that the judgment ought to be affirmed.

I do so both upon form and also upon substance. I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

Now upon the form, how does this case stand? I put aside the name of Mr. *Partington*, who is only acting as attorney. Take the

name of *James Cook*. *James Cook* comes to this country. He applies to the proper forum for the grant of two letters of administration. These two separate grants of letters of administration are made to him, in entire accordance with the practice of the forum in this country. According to the Act of Parliament, they are to be granted "for or in respect of certain property." And in this case, beyond all doubt, the property "for or in respect of which" they are granted is, in the first instance, the personal estate of *Isabel Cook*, which is within the jurisdiction, and in the second place the personal estate of *Ellis Cook*, which is also within the jurisdiction. And, in both these cases, before the grant can be made, an affidavit must be given in, and, for the purposes of this argument, it does not alter the matter, that from the difficulty of ascertaining the truth, the affidavit has to be made afterwards, and not before. If the truth is known before, the affidavit must be made, on the part of the person applying for probate, that the estate and effects of the deceased for and in respect of which letters of administration are to be granted, exclusive of trust estate, without deducting anything on account of debts, are under a certain value to be therein specified.

Now no person disputes that there was, both in the case of *Isabel Cook* and in the case of *Ellis Cook*, at the time of the death of each, the property within the jurisdiction in respect of which duty is sought. There is no dispute that if the letters of administration are to be granted, that is the property in respect of which they are granted. Therefore it appears to me that we have nothing more to consider in this case than this. It being admitted that there are two grants of letters of administration, what is the proper stamp to be affixed upon those letters of administration? I think, therefore, that in point of form these considerations would be quite sufficient to dispose of the case.

But, I am quite willing to look also at the substance. It appears to me that in respect of substance also the judgment is right, and for this reason. What is the privity which *James Cook*, coming here, is able to establish between himself and those in respect of whom the letters of administration are granted? Could *James Cook* come here and establish any privity between himself and *Isabel Cook?* Could he say "At the death of *Isabel Cook* the whole of her personal estate devolved upon me, and I now ask for

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letters of administration to administer it?" He clearly could not; because at the death of *Isabel Cook* her personal estate did not in any shape or form pass to *James Cook*, it passed to a wholly different person. Therefore, *ex necessitate*, *James Cook* must come to the Court in this country and say, "I admit that I have no connection whatever directly with *Isabel Cook*. I admit that the property which passed from Mrs. *Shard* to *Isabel Cook*, passed from *Isabel Cook* to some one else." If he came, without any intermediate link between himself and *Isabel Cook*, he would be obliged to confess that he has no right to the estate. Therefore, he says, "My right is not to the estate of *Isabel Cook*—my right is to the estate of *Ellis Cook*. I am the son of *Ellis Cook*, and the person entitled to his estate. I want, and I must have, letters of administration to the estate of *Ellis Cook* in this country." And, then, when he has obtained those letters of administration, it does not matter that they both were granted *uno flatu*. They must be marshalled according to their proper order. When he has obtained letters of administration to *Ellis Cook*, he goes farther and says, "Now, I have the same right that *Ellis Cook* would have had if he had been alive, namely, a right to ask a farther grant of letters of administration to the estate of *Isabel Cook*," and the process is performed, after the death of *Ellis Cook*, just in the same way as if *Ellis Cook* had first obtained letters of administration, and then, before taking the property in this country, had died, and *James Cook* had come forward and obtained letters of administration to his father.

My Lords, it might be tested in another way, and it would come to the same result. Suppose *Isabel Cook* had, by a proper testamentary disposition in *America*, bequeathed the whole of her property, coming to her as next of kin of Mrs. *Shard*, to a stranger—say to *John Smith*—and that then, before any of the money was recovered, *John Smith* died, leaving a son, his sole next of kin—and that son came over here, he could not have established any privity between himself and *Isabel Cook*—he would have been obliged to confess that he claimed as the son of *John Smith* who was the universal devisee and legatee of *Isabel Cook*. And in that way he would have first to take out letters of administration to his father, *John Smith;* and then, as administrator of his father, to prove the will of *Isabel Cook*. It does not matter that it is done

through the medium of letters of administration. The result is the same. I therefore entirely agree in the motion that this appeal should be dismissed.

Mr. *Cotton* stated that there was an arrangement with the other side that there should be no costs.

Judgment of the Court of Exchequer Chamber affirmed.

Lords' Journals, 11th June, 1869.

Attorney for the Plaintiff in Error: *Ewbank.*
Attorney for the Inland Revenue: *Melvill.*

1862
July 22.
1863
May 21.
1865
April 7.
1867
August 1, 6, 8, 15.
1869
May 4.

IN COMMITTEE FOR PRIVILEGES.

WILTES CLAIM OF PEERAGE.

Peerage—Limitation—Previous Decision in another Case—Practice.

The decision of the Committee for Privileges as to the advice it shall give Her Majesty upon one particular claim of peerage, does not resemble the decision of the House sitting as the tribunal of ultimate appeal upon a question of law in a suit between two adverse parties; it is in no sense a judgment, and cannot, therefore, be treated as a binding authority in another claim of peerage, even though the terms of the patents in the two cases may be like each other.

The Crown cannot give to the grant of a dignity or honour a quality of descent unknown to the law.

A limitation to heirs in the grant of a peerage may be incapable of taking effect, and yet the patent, so far as the grantee himself is concerned, may not be void.

In the reign of *Richard* II. an Earldom was created *habendum, &c.*, "*A. et haeredibus suis masculis imperpetuum.*" The grantee sat in Parliament as Earl under this creation:—

Held, that it did not create a dignity descendible to his heirs male general.

The Earl was beheaded by *Henry of Lancaster* when he invaded *England*, and before he had received or even claimed the Crown. There was no evidence whether there had been any trial, or form of trial, before the beheading. When *Henry* was declared King a proceeding took place in Parliament in which the Commons were represented to have prayed that all that was done in "the pursuit, arrest, and judgment" of the Earl might be declared good for the common profit of the realm. The King, with the assent of the Lords Temporal, declared that it was so. This proceeding was entered on the *Placita Coronæ* in Parliament, but not on the Rolls of Parliament.

Semble, that this was not an Act of Parliament;

But—it was a solemn adjudication pronounced by the King in open Parliament at the prayer of the Commons, and with the advice of the Lords, and must be taken as a Parliamentary declaration that, whatever had been the nature of the grant to the Earl, it was wholly at an end.

SIMON THOMAS SCROPE, Esq., of *Danby*, in the county of *York*, presented his petition to the Queen, praying for a writ of summons to be issued to him as Earl of *Wiltes*, and this petition was referred by Her Majesty to the House of Lords. The petition was founded on the following statement of facts:—

Sir *William Scrope*, of *Bolton*, was the eldest son of Sir *Richard*

Scrope, of *Bolton*, who was summoned to Parliament in the reign of *Richard* II. Sir *William Scrope* was employed by the King in many public services and appeared to have been a great favourite of his majesty. In 1394 he was made a Knight of the Garter, and in 1397 was created Earl of *Wiltes*.

The creation took place, as thus described in the Roll of Parliament for the 21 Rich. 2.:—

"*Rotulus Parliamenti apud Westr. &c., &c.*

"*Perfeccion des Ducs.* *Item mesme le Samady en le fest de Seint Michel en mesme le p̃lement le roy fist p̃nuncier t̃ monstrer ovtẽment en p̃lement q̃il voet q̃ c̃teins honr̃ables p̃sones de son roialme soient honr̃ez t̃ enhancez t̃ changez a greindre honr̃ t̃ estat cest assavoir ascuns q̃i sont contees a lestat t̃ degree des Ducs t̃ un conte a lestat de marquys t̃ certeins autres q̃i sont barons t̃ bañettes a lestat t̃ degree des contes.*" It then went to state the welfare and advantage of the kingdom as the reason for the creation of these honours, and described the King as sitting in Parliament crowned in his Royal Majesty, holding in his hand the royal sceptre, having "created his cousin then Lord *Henry of Lancaster* Earl of *Derby* to be a Duke, and to him had given the name and style of the Duke of *Hereford*, to have and to hold *to him and his heirs male of his body begotten.* And upon this delivered to him his charter royal of the said creation, which was read in Parliament, and the King upon that girded the said Duke with the sword, and put upon his head a cap of honour and dignity of Duke, and received his homage, in the manner accustomed before that time.

"Item, on the same day, and in the same form and manner, Lord *Edward* Earl of *Rutland* was made and created to be Duke of *Aumarle.*

"Item, on the same day, and in the same form and manner, Lord *Thomas de Holand* Earl of *Huntingdon* was made and created to be Duke of *Exeter.*

"Item, on the same day, and in the same form and manner, Lord *Thomas Mowbray* Earl of *Nottingham* was made and created to be Duke of *Norfolk.*

"Item, our Lord the King being willing to honor, enhance and increase the name and state of his honorable cousin, *Margaret Marshall*, Countess of *Norfolk*, on the same day, in full Parliament, in

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the absence of the said Countess, has made and created the said Countess to be a Duchess, and to her has given the style, title, honour and name of Duchess of *Norfolk*, to have for the term of her life. And upon that has sent her his charter of the aforesaid creation.

"Item, on the same day in Parliament, Sir *John Beaufort* Earl of *Somerset* was made and created to be Marquis of *Dorset*, and girded with his sword, and a circlet put upon his head, in manner and form accustomed.

"Item, on the same day was made and created Sir *Thomas* Lord *Despenser* to be Earl of *Gloucester*, and girded with his sword in manner and form accustomed.

"Item, on the same day, and in the same form and manner, Sir *Ralph* Lord *Nevill* was made and created to be Earl of *Westmoreland*.

"Item, on the same day, and in the same form and manner, Sir *Thomas Percy* was made and created to be Earl of *Worcester*.

"Item, on the same day, and in the same form and manner, Sir *William Lescrop* was made and created to be Earl of *Wiltes*."

The writ of Privy Seal and the patent, both alike, differed from this last "Item" in this respect, that both impliedly contradicted the expression "in the same form and manner," and declared a limitation of the peerage of a particular and unusual sort. In both the words of the creation, after the usual phrases of royal approval of the intended grantee, declared that "We considering the probity, strenuous and provident circumspection, and the two-fold illustriousness of conduct and of birth of our beloved and trusty *William Lescrop*, Knight, and willing therefore the said *William*, for his merit, by the prerogative of honour, to exalt the same *William* to the Earldom of *Wiltes*, in our present Parliament, we have preferred and created, and him, by the style, title, and name, and honour of the aforesaid place, by the girding of the sword we have invested, *to have to him and his heirs male for ever*." Then followed the usual grant of money out of the issues of the county to support the dignity, and the charter ended thus:—"Given under our hand at West^r. xxix. day of Sep^r. By the King himself in Parliament."

In 1399 King *Richard* went to *Ireland*. He appointed the Duke of

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York Regent, and the Earl of *Wiltes* (whom he had made Lord High Treasurer of *England*), Sir *John Bussy*, and Sir *Henry Green*, guardians of the realm in his absence. *John of Gaunt* had died. *Henry of Lancaster* whom (after creating a duke) the King had banished, claimed to succeed to the possessions of his father, *John of Gaunt*. Some of these possessions had been seized unto the King's hands, and some had been granted out to other persons, and amongst others to *William Lescrope*, Earl of *Wiltes*. The Duke resolved to enforce his claims by arms, and landed at *Ravenspur*, in *Yorkshire*. He was there joined by the Earl of *Northumberland* and other discontented nobles. The Earl of *Wiltes*, *Bussy*, and *Green*, after a vain attempt to rouse the Londoners to resistance (1), fled to *Bristol*. *Henry* quickly followed them thither, the town and castle surrendered at once, and the Earl of *Wiltes*, *Bussy*, and *Green*, were taken and beheaded. There was not made by any one of the many chroniclers of the event, any statement of a formal trial, although one of them (*Grafton*) used the words "were adjudged and were beheaded."

The Parliament, already elected in the 21 Rich. 2, was speedily assembled, and *Richard Lescrop* was present. The Parliament Roll of the 1 Henry 4 (2), contained the heading:—"*Ptita Corone coram domino rege in p̃liamento suo teñto apud Westmonasterium die Lune in festo Sancte Fidis Virginis anno regni regis Henrici quarti post conquestum primo.*" After some other matters, but apparently without any change in the style or heading of the document, there was the following entry:—"Item. On Wednesday, the 19th day of November, in the said Parliament, the said Commons prayed to the King that the pursuit, the arrest, and the judgments, and whatever was done towards *William Lescrop*, Chivaler, *Henry Green*, Chivaler, and *John Bussy*, Chivaler, might be affirmed in this present Parliament, and held for good, on which occasion Mons^r *Richard Lescrop* rose up, and with great humility and much weeping, prayed to the King that nothing that might be done in the said Parliament should turn to the disherison of the said *Richard*, nor of his children; of which *Richard* it was demanded if the said pursuit, arrest, judgments, and whatever was

(1) One chronicler represents that no money the Earl of *Wiltes* could offer them would make them join him, and another, that the people protested they would not fight against the Duke of *Lancaster*, whom they considered to have been very unjustly treated.

(2) Min. of Ev. p. 47.

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done as above is said, were good or not; and the said *Richard* said that he willed not, neither did he know how to say, but that the pursuit, arrest, and judgments aforesaid, and what was done as above is said, were good and profitable for the King and the Realm, and that his son was one of those, and for that he was deeply grieved. And upon this the King related how at the time when he claimed the Kingdom and Crown of *England*, with all their members and appurtenances, as heir of blood by right line from the King *Henry*, and by the right which God had given him, and with the aid of his relatives and friends thereby the said realm to recover, which realm was on the point of being undone by the fault of misgovernance, and disregard of the laws and customs of the realm, that it had not been his wish that any should think that by way of conquest he wished to disinherit any one of his heritage, franchise, or any other right that he ought to have, nor any one to oust of that which he had, or was entitled to have, by the good laws and customs of the realm, except those who had been opposed to the good purpose and common profit of the realm, whom not only the King held the said *William*, *Henry*, and *John* for such, and guilty of all the evil that had come to the realm, and therefore he willed to hold and to have all the lands and tenements which belonged to the said *William*, *Henry*, and *John*, within the realm of *England* as without, by conquest. And upon this it was demanded of all the Lords Temporal their opinion of the pursuit, arrest, and judgments aforesaid, and whatever had been done as before is said, the which Lords all of one accord declared that the said pursuit, arrest, and judgment, and whatever was done as above is said, were good, and they affirmed them for good and profitable. And then the King declared that it was not his intent to have any lands or tenements as to which the said *William*, *Henry*, and *John* were enfeoffed to another's benefit, but that their rights should be saved to them in all points, notwithstanding the conquest aforesaid, and, farther, the King said to the said *Richard* that he would not take any land that belonged to him or his children now living, but held him for a loyal knight, and at all times for such had held him. And, farther, the King declared that the statute made before that time that there should be no forfeiture after death, &c., was in full force, and this ordi-

nance and declaration in this Parliament was not prejudicial to the same statute, because that these persons were judged and conquered in their lives. And thereupon the said Commons thanked the King for his right judgment, and for this, that God had sent them such a King and Governor." 1862-3-5-7-9. WILTES CLAIM OF PEERAGE.

The same Roll, in another part, contained a petition from the "wife of *William Lescrop*," reciting that her "said husband at the time of his death had no time on account of his hasty death," to provide for her, and praying for a grant out of the Exchequer. This petition was indorsed with a grant of £100 a year, which grant was described as made by "the King of his special grace with the advice and assent of the Lords Spiritual and Temporal, and at the especial prayer and instance of the Commons in Parliament." On the Pell Issue Roll a payment of this grant was entered as made to "*Isabella*, who was the wife of *William Lescrop*, Knight, late Earl of *Wiltes*, deceased."

The descent of the claimant, and the fact that he was the heir male general of *William Lescrope*, were proved.

Mr. *Fleming*, Q.C., and Mr. *Edward Cayley*, appeared for the claimant.

The *Attorney-General*, and Mr. *Charles Clark*, appeared on the part of the Crown.

The case was originally opened in 1862, but as all the arguments then used were repeated and enforced in 1867, it will only be necessary to refer to the discussion at the latter period.

Aug. 1. Mr. *Fleming*, after stating the nature of the claim, and particularly the words of grant both in the writ of Privy Seal and in the patent of creation issued upon it, contended that the decision in the *Devon* Peerage (1) was a full and incontrovertible authority, and governed the present case. There, as here, the grant of the Earldom was to the grantee and "his heirs male for ever," and the Committee for Privileges having heard that 1867

(1) 2 Dow. & Cl. 200; see also a special and very minute report of the case by Sir *Harris Nicholas*, entitled "The *Devon* Peerage," 8vo. 1832, which is the report generally referred to in the argument and judgments on this claim of peerage.

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grant fully argued, held that the peerage was well created, and that the Viscount *Courtenay*, who was the heir male general of the grantee, was entitled. The Committee could not sit here as a Court of Error on the *Devon Case*. A decision in the *Howard de Walden Case* in 1784 was in that way recognised as decisive in the case of a succeeding claimant in 1807.

THE COMMITTEE desired to hear the Attorney-General on this point.

The *Attorney-General* (Sir *J. B. Karslake*) submitted that although the decision in the *Devon Case* was one which was entitled to every respect, it was not a binding authority on this, or on any other patent of peerage framed in similar terms, that might come before their Lordships. In the first place, what was the effect of the patent depended much on the question of intention, as shewn by the peculiar language employed. In the *Devon* patent the Crown declared expressly its desire that the grantee should hold such honours as certain of his ancestors had held before him. There was no such statement of intention here. Assuming, for the sake of argument, that the *Devon Case* was a conclusive authority that the Crown had power to make such a grant, still in order to be an authority in any subsequent case, it must be shewn that the intention of the Crown was identical in the two cases. That could not be shewn here, since the language used was not only not identical but was different. And, therefore, both on the question what was the intention of the Crown, and on the question whether the words used conclusively expressed that intention, the matter was open for discussion. There was besides a great difference between a decision on a question of law, which was to govern the future dealings of men in the ordinary business of life, and a decision upon a claim of a peerage which had not been made upon a precedent, and which would not form a precedent for making another.

Mr. *Fleming*:—It was clear that the Crown had power to make such a grant. The intention of the Crown could only be collected from the operative words of the instrument itself, and in this case the operative words being exactly those employed in the *Devon Case*, that case was an exact precedent, and ought to be followed as

a binding authority. This House had always most strictly guarded any resolution when once made. The ordinary form, where the House was not satisfied in favour of a claim, was—That the Petitioner had not made out his claim. That left the matter open for farther investigation. But when it was intended to negative a claim, the form was adopted, as in the *Banbury Case* in 1813—That the Petitioner had no right to the title. That precluded the farther discussion of that claim. On the other hand, when the House, after fully considering a case on the form of the patent, declared the grant to be valid, and put a construction on it, a patent in exactly the same form of words must necessarily receive the same construction.

THE COMMITTEE did not think the decision in the *Devon Case* conclusively binding in this, and therefore desired to hear the argument on the questions of the validity of the patent and the continuing existence of the Earldom.

Mr. *Fleming*:—It must now be taken as settled that the Crown had the power to grant a peerage with limitation to the heirs male general of the grantee. If so, then little doubt could exist as to the patent here. The words of a preamble were immaterial—the words of the operative part were alone important. Those words here are clear, and are sufficient at once to shew the intention of the Crown, and to justify the argument that that intention was carried into effect. First, as to the intention, it was perfectly clear that Sir *W. Scrope* had been employed in very high and important matters by the King; that he had discharged his duties entirely to the King's satisfaction, and that he was personally a great favourite with his Sovereign. The King therefore determined to shew him some special mark of graciousness. Hence this difference between the patent to Sir *W. Scrope* and to the noblemen and gentlemen created on the same day. There was no pretence for saying that there was a clerical error in the patent, for the writ of Privy Seal was still in existence, and the words used there and in the patent were exactly the same. The statement in the account of the creation of these Peers that they were made in the "same manner and form," is wholly inapplicable

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for the purpose of raising a suspicion as to the words of the creation, for that general statement refers to the mode of the investiture, and not to the words or meaning of the grant.

It is settled law that "if the King for reward of services granteth arms or armories to a man and his heirs male, without saying 'of the body,' this is good, and they shall descend accordingly:" *Co. Litt* (1). All the cases establish this rule, that "heirs male" can never be read in any instrument as "heirs male of the body," unless there are other words compelling that construction; for although such words would be void with regard to land, they are not void with regard to honours. Though such a grant of honours made by the Crown created a fee, yet the donee could neither aliene nor extinguish the honours, for the dignity is personal: *The Oxford Case* (2); *The Purbeck Case* (3). [THE LORD CHANCELLOR (Lord *Chelmsford*) referred to *Co. Litt.* (4).] The words "heirs male" in the grant must therefore mean heirs male collateral as well as lineal, and the grant, being a grant of honours, is valid. This opinion was, indeed, doubted in the *Oxford Case* (2), where the operative words of the grant were the same as they are here; but both Lord *Brougham* and Lord *Wynford* in the *Devon Case* (5) condemned that doubt, which they said arose from confounding peerages with entails of lands. In this instance the grant was recognised as good, for the Earl of *Wiltes* sat in Parliament under it, and took an active part in the parliamentary proceedings. His title to do so was never questioned.

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There have been other peerages granted with the same limitation. That of the Earl of *Oxford* was granted in the 16 Rich. 2; that of the Earl of *Wiltes* in the 21 Rich. 2; that of Lord *Hoo* and *Hastings* in the 26 Hen. 6; and in all these cases the grantees sat in Parliament. They could not have sat merely under the writ issued upon the patent, for the writ is referred to the patent, which is, in fact, the authority for it to issue. The cases of Lord *Egremont* and of Lord *Richemont Grey* were other cases of the same sort, and those Lords also sat in Parliament. Such grants were, no doubt, rare; but these instances shew

(1) 27 a.
(2) Sir W. Jones, 99-109, 123.
(3) Show. P. Cas. 1—9.
(4) 20 a.
(5) Pages 162, 193.

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that they were not unknown, and the fact that the donees sat under these grants shews that they were always esteemed to be valid. Lord *Hoo* died without heirs male. Lord *Egremont* left a brother, the Earl of *Northumberland;* but that brother was attainted by Act of Parliament in 1461, and consequently there could be no succession. Lord *Richemont Grey* was also attainted, and so that dignity was extinguished. In the *Oxford Case* there was succession. In the *Wiltes Case* there was none; but that arose from the circumstances of the family, all the members of which, with the exception of Sir *R. Scrope,* the father of the Earl, were in opposition to *Henry* IV. There were two Irish grants of a similar kind. One was to *Lewis Boyle* (a son of the Earl of *Cork*), who was created Viscount *Kynalmeaky,* and another grant to *Roger Boyle* (another son of the Earl) who was created Lord *Broghill,* and in each case the grant was to the grantee and the heirs male of his body, in default, &c., to the heirs male of the body of his father, and for default of such issue to "the right heirs male of the said Earl for ever." [LORD REDESDALE:—In each the grant was to the heirs male of the body of the grantee, and then to the heirs male of the body of the Earl.] That is so; but the ultimate remainder is to "the heirs male of the Earl," and there was succession in those cases; but as the Earls sat under a higher title, they did not appear to claim these particular titles, though they used them. These and many other cases shewed that a patent would be valid, though it contained limitations of a peculiar kind. The Scotch law undoubtedly recognised grants of the same sort as this now under consideration.

Then comes the matter of non-claim. The first observation on that is, that mere non-claim does not put an end to a dignity (1). The next observation is, that the state of the family precluded a claim. Sir *R. Scrope,* the father, who, no doubt, was called by *Henry* IV. a "loyal chevalier," died in the fourth year of that King's reign; *Roger,* the next brother to *William,* and who was *William's* heir, died in a very short time afterwards. He left a son *Richard,* who was then only ten years of age. *Richard* came of age in 2 Hen. 5, but never sat in Parliament; he died in 1420, and no member of the family sat in Parliament before 1442. The last

(1) Hastings Peerage, 8 Cl. & F. 144.

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Lord *Scrope*, of *Bolton*, of that line died in 1630, and his male heir was his distant relative, *Christopher Scrope*, who was a recusant convict in 1629, and as such could not prefer any action or suit, and would not have been allowed to make any claim at the Bar of this House.

The whole of the Acts passed in the 21 Rich. 2 were repealed by an Act in the 1 Hen. 4. It was for a long time supposed that that repealing Act put an end to the dignities which had been created in the 21 Rich. 2, and the peers who had been then created returned to the use of their old titles. That was a mistake; for when, in the 5 Hen. 6, there was a dispute as to precedency between *Mowbray* Earl Marshal, then the heir of the Earl who had been, in the 21 Rich. 2, created Duke of *Norfolk*, and the Earl of *Warwick*, who claimed to be the senior Earl, and where the dispute ran so high that the peace of the country was endangered, the Commons interfered, and represented that the dispute was wholly vain, for that, in truth, the Earl Marshal was Duke of *Norfolk*. That representation was made in 1425-6; it was acknowledged to be correct, and it ended the dispute, the Earl Marshal taking his seat as Duke. But the existence of the belief that led to that dispute was, no doubt, one of the many causes why the title of the Earl of *Wiltes* was never claimed by any Lord *Scrope*. And that was rendered the more likely by the fact, that after the death of *Richard Scrope*, the father of the Earl of *Wiltes*, in 1403, no Lord *Scrope* of *Bolton* sat in this House till 1442. To that must be added the Wars of the Roses, during which time there was little opportunity for considering and determining questions of this nature. The non-claim was thus fully accounted for.

The King had made Sir *W. Scrope* Lord of *Man*, that was as a sovereign prince. That Lordship of *Man* had been created a sovereignty by *Edward* III., with the assent of the prelates, earls, barons, and other magnates, and from that time there is no other entry on the Rolls of Parliament dealing with that island. In *Rymer's Fœdera* (1) is a treaty made in 1395 between *Richard* II. and the King of *France*, and one of the parties to the treaty, as an ally of the King of *England*, in respect of the Lordship of *Man*, is *William Le Scrope*. It was, in fact, a sovereign lordship not de-

(1) Vol. vii. p. 820.

pendent on the Crown of *England*. There had been several violent proceedings in the Parliament of the 11 Rich. 2, when the King's uncle, the Duke of *Gloucester*, and a commission, really usurped and exercised the kingly power. In the 21 Rich. 2, several Lords appealed, as it was called, the Duke of *Gloucester* and others of high treason for what they had done in the eleventh year of the King. One of the Lords Appellants was *William Le Scrope*, and the effect of that appeal was to revoke and annul in the Parliament of the 21st all that had been done in the Parliament of the 11th of the King. The Earl of *Arundel* was attainted and executed, but *Richard Le Scrope*, the father of the Earl of *Wiltes*, who had acted with the Duke of *Gloucester*, received a pardon. The Earl of *Warwick* was sentenced to death, but the King spared his life, but sentenced him to be imprisoned, and handed him over to the Earl of *Wiltes*, and his brother, Sir *Stephen Scrope*, to be imprisoned in the *Isle of Man*. *Richard* II., when he banished the Dukes of *Norfolk* and *Hereford* upon the well-known quarrel between them, gave an undertaking that if any inheritance should come to either of them during their absence from *England*, he would grant livery of that inheritance to their respective attorneys. He did not perform that undertaking, but granted to the Earl of *Wiltes* and his brother Sir *Stephen Scrope*, some of the lands which did so come to the Duke of *Hereford*, on the death of his father and his own succession thereby to the Dukedom of *Lancaster*. These various matters were quite sufficient to account for the personal hostility between the Earl of *Wiltes* and the Duke of *Hereford*, and for the manner in which the latter first took away the Earl's life and then seized upon his property. But none of these proceedings on the Earl's part amounted to treason, or could afford legal ground for the forfeiture of the dignity which *Richard* had conferred on him and his heirs. Nor could any of them justify the seizure of the Earl's lands as upon a forfeiture for treason, and most especially the *Isle of Man*, which the Committee has seen was really held as an independent sovereignty. This view of the matter is warranted by the fact, that when Sir *W. Bagot*, who had escaped to *Ireland*, was afterwards captured and proceedings were taken against him, he was allowed to go free. As to the Earl of *Wiltes*, Sir *John Bussy*, and Sir *Henry Greene*, they were captured

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on the afternoon of the 28th of July, and were beheaded on the following morning. There is no evidence that they underwent any form of trial, and no trial in a proper legal form was then possible. The Duke of *Lancaster* was at that time only a subject; he had not even claimed the Crown, and his putting to death the King's councillors could not be justified in any way whatever. If it was possible to conceive that there had been any judgment, it could not have been a judgment of a competent or legal tribunal, and no judgment, except of this latter sort, could possibly create an attainder. The insufficiency of the actual proceeding in every way is proved by all the authorities: *Foster's* Crown Law (1); *Hale's* Pleas of the Crown (2); *Coke's* Institutes (3); *Blackstone* (4). Even if it had been possible, which it was not, for the Duke to assemble the Court of the Constable and the Earl Marshal, and if judgment had there been given against the Earl, that would not have created an attainder occasioning corruption of blood and forfeiture: *Coke* (5); *Hale* (6); *Hawkins* (7). That would have been the case, even with regard to a commoner; but as to a peer, no conviction by any Court within the realm, except a Court composed of his peers, could create either corruption of blood or forfeiture: *Coke* (8).

The Earl of *Wiltes* was beheaded on the 29th of July. *Richard* II. formally abdicated on the 29th of September; so that, for two whole months after the beheading of the Earl, the King appeared to be at the head of the Government. There was not, against the Earl, any attainder for treason, and nothing but an attainder for treason can affect an entailed dignity. But, then it will be said that some judgment was given, and that that judgment was affirmed in Parliament. But no affirmance of a judgment can affect its character; and if the judgment was originally one which could not work an attainder, the mere affirmance of it, even by the Parliament itself, would not have that effect. But it is submitted that what took place in this case was not an affirmance of any judgment or pretended judgment at *Bristol*, and it certainly was not what is desig-

(1) Page 219.
(2) Vol. i. p. 499.
(3) 3 Inst. ch i. art. 11.
(4) Comm. vol. iv. p. 381.
(5) 4 Inst. c. 17, p. 125.
(6) Pleas of the Crown, vol. i. p. 355.
(7) Pleas of the Crown, vol. ii. p. 16,
(8) 2 Inst. c. 29, pp. 46—48.

nated an Act of Parliament. There are two Rolls of the 1 Hen. 4. One is the "Roll of the Parliament, held, &c." The other is "Pleas of the Crown before our Lord the King in his Parliament, held, &c." The first is the collection of the legislative acts of the Parliament; the second a record of its judicial acts. In the latter only is the Earl of *Wiltes* named, and there he is not named by his proper title, but only as *William Le Scrope*, Knight. This second is entirely a plea or judgment roll, and if it is founded on something which is wholly invalid and illegal, it can of itself have no validity whatever. All that this Roll does is this. It begins with the declaration of the Commons, that it is not to be supposed that *Richard*, late King of *England*, could have done the misdeeds, &c., without counsel of several who were about his person; and then it goes on to name the peers who, with Sir *W. Le Scrope*, were, in the 21 Rich. 2, the Lords Appellants against the Duke of *Gloucester*, the Earls of *Arundel*, *Warwick*, and others. The Lords then present (only the Lords Temporal, for no Spiritual Lords were present), by assent of the King, deemed and adjudged that the Lords who had been Appellants in the 21 Rich. 2, should lose from them and their heirs the names they had as dukes and marquises, &c., and the castles, manors, lordships, and other possessions they had of the King's gift at that day or since, and the patents and charters they had of those names, castles, &c., and be in the same state they were before that time; "and thereupon the Temporal Lords, by assent of the King, adjudge and award that if the said Lords Appellants be adherent to *Richard* in counsel, help, &c., against that disposition or judgments, &c., in this present Parliament, they be in pain of treason, and for such holden and reported." This was nothing but a judgment or award, and not an Act of Parliament. The Commons accused, the Lords, with the assent of the King, adjudged, and the judgment was illegal, because there was no attainder on which to found it. Now, in the case of a peer, his dignity cannot be taken away from him but by attainder or by an Act of Parliament: *The Earl of Shrewsbury's Case* (1); *Rex* v. *Knowles* (2); *Blackstone* (3). Another proceeding on the Roll was, that in the case of *John Hall*, who was accused of having taken

(1) 12 Co. Rep. 108.
(2) 12 Mod. 56.
(3) 1 Comm. 401.

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part in the murder of the Duke of *Gloucester* at *Calais*. He was condemned and executed. This was an illegal judgment, for the Lords were not the peers of *John Hall*, and had no right to try him. The Commons took no part in this proceeding. The next and remaining article upon the Roll related to the Earl of *Wiltes*, but only described him by the name of Sir *William Le Scrope*, Knight. (See the paper *ante*.) The Lords advised, but the King alone acted; so that this was nothing more than an ordinance and declaration, and the Commons thanked God for the King's righteous judgment. The proceeding was essentially of a judicial and not a legislative character; it was a plea in Parliament, or a memorandum of what took place in Parliament, and nothing more. It did not even pretend to accuse *William Le Scrope* of treason, and the King declared that it was not his purpose to disinherit any man by way of conquest, save those who had been against the good purpose and common profit of the Realm; but he "would hold and have all the lands and tenements which were of the said *William*, *Henry*, and *John*, as well within the realm of *England* as elsewhere, by conquest." That clearly meant conquest in the ordinary sense of the term. And the Lords affirm all that had been done as good and profitable. It does not pretend to be an affirmance of a judgment as a judgment, but a declaration that "the pursuit, arrest, and judgments, and what had been done," which must have meant the putting to death, were good and profitable. Conquest, used as it was here, must have meant conquest by martial prowess. This document was not an Act of Parliament, nor does it appear on the Rolls as such; it was not in the form of an Act, for the ordinary form was that the Commons prayed, and the King, with the assent of the Lords Spiritual and Temporal, granted; a form not followed in this case.

As a judicial proceeding this was nothing. The Temporal Lords had no power to try the offences of a person who was dead (1), nor to affirm a judicial proceeding which was not brought before them in a judicial form. *Richard Scrope*, the father, was not the heir of the Earl, and *Roger Scrope*, who was so, was not present, and was not called upon to appear. In the case of *Roger Mortimer*, who had been executed under the judgment against him, the proceeding

(1) 25 Edw. 3, c. 2; 34 Edw. 3, c. 12.

was, on the prayer of his grandson, declared void on this very ground, that he was not present when it took place.

The Earl's title, though not mentioned in any document issued by *Henry* IV., was mentioned in several instances in papers issued by *Richard* II. between the time when that monarch fell into the hands of the Duke of *Lancaster* and the time of his formal abdication. Thus, in instruments tested on the 23rd and 28th of August and the 16th of September, certain estates of which *Richard* resumed possession were described as of "*William Le Scrope*, late Earl of *Wiltes*, deceased." And the same description was afterwards, namely, on the 27th of January following, which was in the reign of *Henry* IV., given to him in a receipt on the Pell Rolls. Assuming, therefore, that he had a title of nobility, the description of him in the proceeding now relied on was wrong, and made the proceeding itself invalid: *Ormond's Case* (1); *Lord Pitsligo's Case* (2); the case of the *Garter King-at-Arms* (3); *Ferrer's Case* (4); *Lord Caermarthen's Case* (5).

Even assuming the proceeding in the 1 Hen. 4 to be an Act of Parliament, then it would not affect the peerage. Neither in form nor substance was it an attainder, and nothing else could destroy the peerage. Nor did it contain a statutory declaration that the peerage should cease to exist. In order to forfeit a peerage there must be words either directly affecting it, or clearly embracing it: *Lord Waterford's Case* (6). The grant of the *Isle of Man* to Sir *John Stanley*, after the Earl of *Northumberland* had forfeited it by his treason to *Henry* IV., shews that a declaration of forfeiture for treason was necessary to make the act regular and valid. Sir *John Stanley's* grant contained all that was necessary for that purpose, while in the previous grant to the Earl of *Northumberland*, upon the death of the Earl of *Wiltes*, there was nothing but a declaration of the King's title by conquest, which had been affirmed by the Lords Temporal. Under such a proceeding no title to a peerage could be forfeited. An Act of Parliament, if it alleges treason, and states that the traitor was properly vanquished, creates no forfeiture, unless it distinctly adjudges that there was treason. That

(1) Foster, Cr. L. 82.
(2) Ibid.
(3) 1 Leon. 249.
(4) Sir W. Jones, 346.
(5) Salk. 451.
(6) 6 Cl. & F. 133.

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is shewn in the *Earl of Arundel's Case*. In the 1 Edw. 3 was an Act which declared that *Edmund*, the Earl, with others, did usurp the royal power, so that the King nothing did, nor would do, but as the Earl and others "did counsel him." Then it stated that the Queen and her friends came to *England* with a force, and vanquished and destroyed the Earl, and this vanquishing and destruction were, by the Act, declared and affirmed to be good. But, in the 28 Edw. 3, it was declared that no forfeiture thereby accrued, that the Earl was "unduly put to death, and that the words recited in the statute touching the death and destruction of the said *Edmund* are void, erroneous, and null." So that, assuming this proceeding against the Earl of *Wiltes* to be an Act of Parliament, it creates no forfeiture, for it does not adjudge a treason. And then it goes on to say that the King is to have the lands and tenements of the Earl as well within the realm of *England* as elsewhere; but there is nothing to affect the peerage, which therefore remained in full force and validity.

Then as to the delay in claiming the title. If the right to it still exists, the delay in enforcing that right cannot affect the right itself: *The Earl of Devon's Case* (1). In the *Hastings Case* (2) the dignity had not been claimed since 1391, but the title to it was upheld in this House in 1841; and in the *Camoy's Case* (3), where no one had sat since 1419, the title was declared subsisting in 1839. There were in this case circumstances quite as strong as in those to explain the delay in claiming the dignity.

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Thursday, Aug. 15. The *Attorney-General* (Sir *J. B. Karslake*):—

The first question relates to the nature of the grant supposed to be made by the patent. On that the *Devon Case* is relied on as an authority. But it is to be observed that in that case the counsel for the claimant did not absolutely rely on the words in the patent alone, but referred to extrinsic circumstances to shew that those words must have been used with the particular meaning there imputed to them. There are no such circumstances here. Sir *W.*

(1) 2 Dow. & Cl. 200; Sir H. Nicolas' Report.
(2) 8 Cl. & F. 144. (3) 6 Cl. & F. 789.

Scrope was no doubt a favourite of *Richard* II., but there were others of those elevated in the peerage at the time when his Earldom was created, who were as much favourites, and who were connected in blood relationship with the King himself. In the *Devon Case* the patent itself recited the ancient honours of the *Courtenays*, and assigned those honours as reasons for the special grant there made, declaring the object of the Crown to be to restore to the descendant the honours which had belonged to his ancestors. There was a similar reason in the *Oxford Case*, where the declared intention was to "restore" ancient honours. There was nothing of this sort in the *Wiltes Case*. So far from there being any special reason stated why the Earl of *Wiltes* was to receive an honour different from any of the rest, the Roll expressly states that he was created "in the same form and manner" as those before him. Now they were made by grant and investiture, and with other forms and ceremonies, and the grant to each of them was to him and the heirs male of his body begotten. His was the last of the creations, and the ordinary words of limitation after the words "heirs male" might easily have been omitted, and the omission was not at all unlikely, especially as it was expressly stated that he was created "in the same form and manner" as those who had gone before him.

There is no settled principle that a grant of this kind is a grant in fee. The grant of arms does not establish that, for though, as contended on the other side, a grant of arms to a man and his heirs would go to heirs collateral, for which *Coke* upon *Littleton* is cited (1), the explanation of that is given at another place in the same work (2), where it is said that "every son is as great a gentleman as the eldest son is." The grant of arms is therefore a peculiar grant, descends in the way of gavelkind, and is in no way a governing precedent for the descent of a personal and individual dignity.

The decision in the *Devon Case* really impeaches the general validity of a grant like the present, and only allows it under the special circumstances to be found in that particular case. And with regard to other cases which have been mentioned (3), where

(1) 27 a. (2) Page 140. (3) *Ante*, p. 134.

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the grant was to a man and the heirs of his body, and, in default of them, to heirs who were collaterals, the answer is, that these were exceptional cases, and that the special intention was distinctly expressed on the face of the patent.

Why had not this peerage been claimed till now? There had been various reasons suggested for that non-claimer, in the state of the family and other circumstances. But first it was said that it was, erroneously, supposed that a statute (c. 3) of 1 Hen. 4 had entirely annulled all that had been done in the 21 Rich. 2, and that that error was not corrected till the dispute for precedence arose between the Earl Marshal and the Earl of *Warwick*. The proceedings do not justify that argument. No suggestion was made by either of those disputants as to the statute of Hen. 4 having affected the dignities created in the 21 Rich. 2—the remark was introduced in the discussion but had not been relied on by them—when introduced it was at once scouted by the Judges and serjeants, and it was said that many of the persons who were created in 21 Rich. 2 had continued to use their titles and names of dignity up to that time, namely, the reign of *Henry* VI., when the dispute in question occurred. Now *Henry*, the fourth Lord *Scrope* of *Bolton*, was alive at the time of the settlement of this claim of precedence between the Earl Marshal and the Earl of *Warwick*, and if there had been no other reason for not claiming the Earldom of *Wiltes* than that arising from a mistake of the construction of the statute of Hen. 4, there can be no doubt that this Lord *Scrope* would have claimed the Earldom of *Wiltes*. He was summoned to Parliament as Lord *Scrope* in 1442, and lived until 1459, yet he never claimed the title of Earl of *Wiltes*. Then came the fifth Lord *Scrope* of *Bolton*. He was made a Knight of the Garter in the 1 Edw. 4, and he appears to have been high in favour with the Crown. He married more than once, and with ladies of high rank and position; yet he never claimed the Earldom. The sixth Lord *Scrope* of *Bolton* was also a man in high position, and married the daughter of the Earl of *Northumberland*, yet he, again, never claimed to be Earl of *Wiltes*. It is difficult to account for non-claim under such circumstances except by referring it to the settled conviction of every body that either the title had not been created as is now supposed, or that it had entirely

ceased to exist in consequence of the proceedings in the first year of *Henry* IV.

Then as to the form of the proceeding. It is probable that there was some form of trial at *Bristol*, but of course it could not have been in any way a regular trial. In those times the illegality, according to our notions, of what was done, was glaring. There are Acts of Parliament declaring that persons then dead, who had had no trial whatever, had been guilty of treason—there are others which declared what, if it was a crime at all, was the crime of murder, to have been treason—there are condemnations without trial, and executions following upon them, and then Parliamentary annullation of what had thus been done, and then annullations of these annullations themselves. What was done in the Parliament of *Henry* IV. must be considered, as to its validity, with reference to what was deemed valid in those times, not with reference to what would be required now. The proceedings of the Lords Appellants in the 21 Rich. 2, *William Le Scrope* being one, were precedents for what was afterwards done with respect to himself. There was little or nothing of that judicial regularity which would be absolutely and peremptorily required at the present day.

The Act of 1 Hen. 4 is not affected by the absence of the Spiritual Peers. In the first place, the Spiritual Peers, as ecclesiastics, would not take part in matters of life and death. In the next, they sat in Parliament on the same baronial holding as other peers, and could not by staying away from its meetings destroy the force and validity of what was there determined: *Hallam* (1). Nay statutes have been passed and universally recognised as such where the Parliament was held "*excluso clero*" (2).

The form of the Act was sufficient according to all the precedents and practices of those times. It was an Act done on the petition of the Commons by the King with the assent of the Lords. That was sufficient to constitute it an Act of Parliament: *Coke* (3), where several examples are given.

Then as to the estimation of every body at the time, including even *Richard* II. himself, of the effect of what had been done with regard to *William Le Scrope*. *Richard* II. was, in effect, taken prisoner at *Flint* on the 20th of August. Between that time and

(1) Vol. iii. p. 7. (2) Dwarris on Statutes, p. 20. (3) 4 Inst. 25.

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when he went to the *Tower* he did acts in the nature of Royal public acts. As to some of these it might perhaps be alleged that he did them under coercion of *Henry;* but there were others that in no way bore that character. He dealt with the lands which had belonged to his favourite, *William Le Scrope,* for his own benefit, or for the benefit of others; he directed a seizure of the rents of some, and some he granted away to other persons (1). The necessary inference from that is, that something had occurred which had occasioned, according to the custom and usage of that day, a forfeiture of all that *William Le Scrope* had once possessed. It might not be regular according to our ideas of law at this day, but it was deemed perfectly valid then.

The fact that in the proceeding, which we call an Act of Parliament, *William Le Scrope* is not described as Earl of *Wiltes* cannot affect the matter. In the petition of his widow for maintenance, he is only described as *William Le Scrope,* and she there speaks of his "goods and chattels seized into the hands of the King by reason of the *judgment* which was passed upon the said *William.*" Then follows her prayer that something may be done for her, and then comes the grant, which was a grant of public money, and operated as an Act of Parliament. Now that document, which must bear the character of an Act of Parliament, is not upon the Parliament Roll nor with the *Placita Coronæ,* but appears simply as a Petition. Yet it was an Act, and disposed of public money. There were in those times numerous instances of Acts of Parliament in which the power of Parliament was exercised, it may be in a very irregular, but certainly in a very effective, way. They were treated as entirely valid until another Act, passed, perhaps, in the same irregular way, repealed them. Thus an act was declared to have been treason which was not treason when the act was committed (2).

In this manner, too, "the Lords in this Parliament, by assent of the King, decree that the Dukes of *Albemarle,* &c.," lose and forego their names and rank as dukes (3). There no attainder is declared, and yet the titles were taken away.

Other things likewise were done which fully exemplified the

(1) Minutes of Evidence, pp. 45–46. Jan. Imperial.
(2) 3 R. 2; 4 Inst. 27, in the case of
(3) Minutes of Evidence, p. 203.

correctness of Lord *Coke's* opinion in his description of the transcendent power of Parliament (1). Many instances of the sort are given in the report on the Dignity of a Peer (2). 1867 WILTES CLAIM OF PEERAGE.

It is submitted, therefore, on all these considerations, that the grant in this case did not operate as a grant to heirs male general, or that if it did, something occurred by the authority of Parliament in the 1 Hen. 4 that entirely annulled it.

May 4. LORD CHELMSFORD:— 1869

The claimant has proved his descent as heir male general to Sir *William Scrope*, who, by charter in the twenty-first year of King *Richard* II., was created Earl of *Wiltes* "to have to him and his heirs male for ever."

The questions which arise upon this claim are: First: Whether a patent granting an English peerage to a man and his heirs male for ever is a valid patent? Second: If it be, whether the Earldom granted to Sir *William Scrope* was not afterwards determined by attainder, or forfeiture, or in some other manner?

The first question is one of great interest and importance. The counsel for the claimant, indeed, contended that it was no longer open to dispute, as it had been conclusively settled in his favour by the decision of the Committee for Privileges upon the claim to the Earldom of *Devon*, which the present Committee was bound implicitly to follow. But I cannot agree that the determination of one Committee for Privileges must be a binding and conclusive authority upon another. It may be conceded that an opinion expressed by those who are exercising a *quasi*-judicial function will always be entitled to respect and consideration; but it cannot claim the authority of a final decision upon any particular point of law in the same manner as a judicial determination of the House sitting as a tribunal of ultimate appeal from the judgments and decrees of the Courts of Law and Equity.

The resolution of a Committee for Privileges in favour of a claimant, agreed to by the House, and communicated to the Crown, and which is followed by a writ of summons to the claimant by the title of the dignity claimed, establishes the right to that dignity

(1) 4 Inst. 36.

(2) Part IV. p. 267, *et seq.*

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(at all events from the date of the writ of summons), which can never afterwards be called in question. But the nature of the proceeding upon a claim to a peerage tends strongly to shew that a resolution of a Committee for Privileges is in no sense a judgment, and though admitted to be *primâ facie* valid and conclusive, yet it does not establish a precedent which all future Committees are bound to follow. The proceeding commences with a petition to the Crown (the fountain of honours), praying for a writ of summons by the title of the dignity claimed. The petition is referred to the Attorney-General, who examines into the claim and reports upon it. Although his report may be favourable to the claimant, it is in the discretion of the Crown whether or not the claim shall be referred to the House of Lords. Lord *Eldon*, in the case of the *Earl of Belfast* v. *Chichester* (1), said that the Chancellor was always consulted upon petitions claiming a peerage, and that if he was satisfied with the claim it was not referred to the House of Lords; and he added, "that it imposed a great responsibility on him, as, if he made a mistake he created a peer." I believe the modern practice, in all cases where the Attorney-General reports in favour of the claimant, is to refer the petition to the House without consulting the Lord Chancellor, and the House, upon the reference, makes an order that the petition be referred to the Committee for Privileges. Upon the hearing of the case the Committee comes to a resolution, which is reported to the House, either that the claimant has established, or that he has failed to establish, his right to the dignity claimed. The resolutions of Committees for Privileges are merely for the purpose of information and advice to the Crown. The Crown, though it generally acts upon, is not bound by them. It may exercise its own discretion in giving or refusing its assent to the resolutions.

That they cannot be regarded as final judgments which, when once pronounced must not be departed from, appears from the cases of the Barony of *Willoughby de Broke* and the Dukedom of *Brandon*, mentioned in *Cruise* on Dignities (2). In the former of these cases, Sir *Richard Verney* claimed the Barony of *Broke* as a descendant of the sole survivor of three co-heiresses of the first

(1) 2 Jac. & W. 449.

(2) Chap. iii. s. 80, p. 92, Ed. 1810; chap. v., s. 62, *et seq.*, p. 162.

baron. Upon a reference from the Crown the House of Lords resolved that the claimant had no right to the dignity, on the ground that where a barony by writ descends to co-heirs, it is in the power of the Crown to hold the same in suspense or abeyance, or to extinguish it. Here was a solemn resolution of the House upon a most important question of law, which, according to the argument of the claimant, could never be reversed. But some of the peers having baronies by writ in them, and having only female issue, moved the House that a day might be appointed to consider the subject of the descent of baronies of this description. The question was argued by counsel, and the Lords resolved, that if a person summoned to Parliament, and sitting, die, leaving issue two or more daughters, who all die, one of them only leaving issue, such issue has a right to demand a summons in Parliament. Upon this resolution, Sir *Richard Verney* again petitioned the King for the barony, and his petition being referred to the House of Lords, it was, after long debate, resolved, that he should be heard upon the new matter. Against this resolution a protest was entered and signed by ten peers, one of the grounds of dissent being alleged in these terms: "Because we conceive it may tend infinitely to prejudice the judicature of this House, and to shake the security that all subjects have by the judgments of this great Court, if the Lords shall permit judgments once given in so solemn a manner to be reviewed." It is observed by Mr. *Cruise*, that "this reasoning is fallacious, for in cases of this kind the Lords have no judicature, and do not pronounce any judgment, but only certify their opinion to the King." The claim of Sir *Richard Verney* having been argued, it was resolved, that he had a right to a writ of summons to Parliament by the title of Lord *Willoughby de Broke;* the resolution of the Lords upon the second reference being directly contrary to their former one.

The *Brandon Case* is perhaps a more striking instance than the former of the disregard of a resolution of the House of Lords upon a question of peerage law.

In the year 1711, the House of Lords without any reference from the King, resolved, that the Crown could not, after the union with *Scotland*, confer an English dignity on a Peer of *Scotland*, and upon that ground refused to admit the Duke of *Hamilton*, who had

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been created Duke of *Brandon* in *England*, to take his seat in the House by this latter title. In the year 1719, the House, upon a reference from the Crown, resolved that the Earl of *Soloway*, on whose father the English Dukedom of *Dover* had been conferred, had no right to a writ of summons as Duke of *Dover*, upon the same ground upon which they refused to admit the Duke of *Brandon*. But after these two Resolutions in 1782, the claim of the great grandson of the Duke of *Hamilton*, whose claim was rejected in 1711, having been referred to the Lords, the House resolved that the claimant was entitled to the Dukedom, in direct contradiction to the former opinion.

If the House of Lords, as a Court of final appeal, should decide erroneously upon a question of law, the error may be corrected by the interference of the Legislature. But if the opinion expressed by one Committee for Privileges is to be binding upon all that follow, and (to use the words of Lord *Eldon*) a peer should be created by mistake, it is not easy to see the way to the sort of corrective legislation which could be applied (even if legislation would be proper upon such a subject), and an error once committed must be perpetuated to all future time in the advice given by the House to the Crown upon claims of dignities of a similar description.

Upon these grounds, it appears to me that the advice given to the Crown with reference to the claim to the Earldom of *Devon*, cannot have the effect of preventing inquiry by this Committee into the validity of the limitation of the dignity now under consideration.

There is no reason to suppose that there was any mistake in the wording of the patent of creation of the Earldom of *Wiltes*.

The letter under the Privy Seal, directing the Chancellor to pass a charter under the Great Seal for the creation of *William Le Scrope*, chevalier, to be Earl of *Wiltes*, to hold to him and his heirs male for ever, was produced in evidence, and also the charter of the King in the same terms. The particulars of the creation are entered upon the Parliament Roll of the twenty-first of *Richard* II., which begins with an introduction, that on Saturday in the Feast of St. *Michael* in the same Parliament, the King caused to be declared, and openly shewed his pleasure, that certain honourable

persons of his kingdom should be honoured and advanced to greater honours and estate; that is to say, some of them who were earls to the estate and degree of dukes, and one earl to the estate of marquis, and certain others who were barons and bannerets to the estate and degree of earls. The Roll then proceeds to state the creation of *Henry of Lancaster*, Earl of *Derby*, to be Duke of *Hereford* to him and the heirs male of his body, and the delivery to him of his charter of creation, the creation in the like form and manner of other earls to be dukes, of the Countess of *Norfolk* to be Duchess of *Norfolk* for life, and the sending to her her charter of creation, of the Earl of *Somerset* to be Marquis of *Dorset*, and, lastly, of certain persons to be made earls, amongst whom is this entry, "Item, the same day and in the same form and manner, Sir *William Le Scrope* was made and created Earl of *Wiltes*."

I do not understand this proceeding in Parliament to have been the actual creation of the different dignities, but to have been intended to give greater solemnity to the advancement of the several persons to their high honours (1). The dignities were conferred by the King, and the terms and limitations of them must be ascertained by reference to the charters of creation.

In order to account for the difference between the limitations in Sir *William Scrope's* charter, and in those of the other persons who at the same time received marks of the royal favour, it was said that he was an especial favourite of King *Richard*, and had performed many eminent services towards him. That although his father, Lord *Scrope*, who had been twice Chancellor, was in opposition to the King, yet that Sir *William Le Scrope* and his brother *Roger* were his faithful adherents. That Sir *William Le Scrope* being childless, a grant of the dignity (like the other contemporaneous grants) to him and the heirs male of his body would have terminated with his life, and that the object of the King was not only to ennoble him, but to advance the family, already titled, to a higher rank in the Peerage. All these are mere speculations, and are only useful to prove that the limitations were not inserted in the patent through inadvertence or mistake, which it has been already shewn could hardly have been the case.

(1) And, as a money grant accompanied the charter, to have the authority of Parliament for such grant.

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Was, then, the patent with these limitations valid or altogether void, or good for the grantee's life and void for the rest?

If the question had arisen upon a grant of lands, with the limitations contained in the patent, there would have been no difficulty in deciding it. It is laid down in *Littleton* (1), and the doctrine has never been questioned, that "if a man give lands or tenements to another, to have and to hold to him and to his heirs male or to his heirs female, he to whom such a gift is made hath a fee simple, because it is not limited by the gift of what body the issue male or female shall be, and so it cannot in anywise be taken by the equity of the said statute (*de donis*), and therefore he hath a fee simple." Lord *Coke*, in his comment upon this section, writes (2), "If the King by his letters-patent giveth lands and tenements to a man and to his heirs male, the grant is void, for that the King is deceived in his grant, inasmuch as there can be no such inheritance of lands or tenements as the King intended to grant." The only authority to be found for this proposition of Lord *Coke* is *Lovell's Case* (3). The ground of the decision in that case seems to have been, that the King apparently intended to create an estate tail, and that he could not do so by the words he had used (which, according to the report of the case in *Brook's* Abridgment (4), sounded in fee simple), and that the King being deceived in his grant the grantee was only tenant at will. It is unnecessary to criticise this decision, as it is confined to grants of lands and tenements, but with respect to them it is an authority that the Crown cannot create a new estate of inheritance in them, or give them a new descendible quality.

It is said, however, on the authority of Lord *Coke*, that the law is otherwise in the case of honours and dignities. For after the preceding passage from his comment upon the 31st section of *Littleton*, he proceeds (5), "but if the King for reward of services granteth armories or arms to a man and to his heirs male, without saying of the body, this is good, and, as hath been said, they shall descend accordingly."

This is not strictly a case of descent and inheritance, for, as

(1) Sect. 31.
(2) Co. Litt. 27 a.
(3) Year Books, 18 Hen. 8.
(4) Tit. Patents, 104.
(5) Co. Litt. 27 a.

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Lord *Coke* says (1), "Gentry and arms is of the nature of gavelkind, for they descend to all the sons, and every son being a gentleman alike, which gentry and arms do not descend to all the brethren alone, but to all their posterity."

All that this case of armorial bearings amounts to is this, that when the privilege of using arms is granted in a family, all the males are entitled to them, to be borne by the eldest without a difference, and by the younger with difference. This seems to me to be very far from establishing that the Crown can give to a dignity or honour a quality of descent unknown to the law.

The Crown may undoubtedly create peerages with every sort of limitation which the law recognises. It has even been said that a man may be ennobled during the life of another, or for years, but such grants as these could hardly be maintained, and at all events are not likely ever to be made. In the appendix to Sir *Harris Nicolas'* report of the *Devon Case*, various instances are given of peerages granted with peculiar limitations, but all of them limitations familiar to the law. In the cases where the dignity is given to the heirs of the body of the wife of the grantee, or to the issue male of the second wife, or to the heirs male of a second husband, or to a second son and the heirs male of his body, each of these limitations is a good *descriptio personæ*, and in a grant of lands would carry them to the person designated as a purchaser. But these instances are all of them inapplicable to the case of a limitation which it is admitted could not prevail in other grants than those of dignities.

The grant of the Earldom to Sir *William Scrope* and his heirs male is the first of the kind which proceeded upon a charter from the Crown. The case of the Earldom of *Oxford*, which was a creation of an earlier date, was of a different description. The original charter of creation by *Henry* II. was to *Alberic de Vere* and his heirs (2). The Earldom descended to *Robert de Vere*, the favourite of *Richard* II. In the 11 Rich. 2 (1388) *Robert de Vere*,

(1) Co. Litt. 140 b.

(2) The words are (Rep. Dig. Peer, Vol. v. App. V. p. 3) "*Quare volo et firmiter pracipio quod ipse* et hæredes sui *habeant inde comitatum suum ita libere, &c., sicut aliquis comitum Angliæ*," &c. On this *Selden*, "Titles of Honor" p. 651, says, "*Ad masculos restringebatur hæc dignitas.*"

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who had been created Duke of *Ireland*, was attainted by Act of Parliament, and all his honours were forfeited. He died without issue, leaving his uncle, *Aubrey de Vere*, his heir. In the 16 Rich. 2, the King, in his Parliament, and with the assent of his Parliament restored, gave, and granted the name, title, estate, and honour of Earl of *Oxford* to *Aubrey de Vere* and his heirs male for ever, and made him Earl of *Oxford* in full Parliament. Three weeks afterwards a charter of the Earldom in the same terms was granted to *Aubrey de Vere*. Notwithstanding these proceedings the attainder by Parliament of *Robert de Vere* in the 11 Rich. 2 still remained. This attainder was not removed till the 21 Rich. 2, when all the Acts of the Parliament of the 11 Rich. 2 were repealed. The repeal revived and restored the ancient Earldom of *Oxford* created by *Henry* II. which (as already observed) was granted to *Alberic de Vere* and his heirs, so that *Aubrey de Vere*, who was the heir general, had a right to the original title thus restored. In the 1 Hen. 4 the proceedings of the Parliament of the 21 Rich. 2 were annulled, and those of the 11 Rich. 2 revived. The original creation of the Earldom was thus again abrogated, but the Earldom subsequently created in the 16 Rich. 2 was not at all affected by these proceedings. This appears from the fact that *John de Vere*, by the style and title of Earl of *Oxford*, petitioned King *Edward* IV. for the reversal of the proceedings in the Parliament of 1 Hen. 4, and by an Act of 4 Edw. 4 this reversal was enacted, which again revived the original Earldom. There thus appears to have been two Earldoms of *Oxford*, one by the charter of *Henry* II. to the grantee and his heirs, and the second in the 16 Rich. 2 to *Aubrey de Vere* and his heirs male for ever.

With a view to the determination of the validity of a limitation of a dignity to heirs male by charter, it is important to ascertain from what source the Earldom conferred upon *Aubrey de Vere* was derived. If it was from the Parliament, the succession to it might be directed according to a course of descent unknown to the Common Law. Chief Justice *Crew* treats it clearly as an Earldom given by Parliament. He is under a mistake in putting the case as of "a noble Peer seised in fee of an Earldom taking an estate thereof to him and his heir male by Parliament as long as the male line continueth;" for *Aubrey de Vere* in the 16 Rich. 2 had

no Earldom, the original creation by *Henry* II. having been forfeited by the Act of Attainder of the 11 Rich. 2, and not having been revived till the 21 Rich. 2.

There appears to be good ground for the Judges having advised the House, and for the House having held, that the proceeding in the 16 Rich. 2 was an Act of Parliament. The Roll, after stating the grant of the title, estate, and honour to *Aubrey de Vere*, proceeds, "and presently the said Earl did homage to our said Lord the King, and then was taken and placed in his seat with his peers in Parliament." The charter to *Aubrey de Vere*, which was not granted till three weeks afterwards, recites the proceedings in Parliament, and expressly states that the Earldom was granted with the assent of Parliament.

I have felt it to be necessary to examine minutely this case of the Earldom of *Oxford*, because it has been pressed on the one side as having established the validity, generally, of a limitation of a dignity to heirs male for ever; and on the other, as an authority against a grant of this description, with such a limitation, except by Act of Parliament. Neither of these conclusions from the *Oxford Case* appears to me to be correct. The utmost that it can be taken to have decided is, that a grant of a peerage by Act of Parliament to a man and his heirs male creates an estate in the dignity which will go in that particular course of descent. The opinion of Chief Justice *Crew* and the other Judges, that "if the grant had been made by the King alone it would have been void," was neither adopted nor rejected by the House of Lords, the judgment proceeding entirely upon the creation of the Earldom being by Act of Parliament.

It was now said on behalf of the claimant, that no Scotch lawyer would for one moment doubt the power of the Crown to make a grant of a peerage to a man and his heirs males, and that from the reign of *James* VI. to that of Queen *Anne*, there are to be found no fewer than seventy-nine instances, on record, of peerages of *Scotland* granted with such a limitation. I have no doubt that this statement is perfectly correct, and that the validity of these grants is unquestionable. But the reason is, that although a grant to a man and his heirs male is a limitation wholly unknown to the law of *England*, in *Scotland* such a disposition is familiar and perfectly

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legal, and under it females are altogether excluded even as links in the succession, and the heir male is called in the entail thus created in place of the heir of line. It is therefore impossible to argue in favour of a limitation in this country, where it is not recognised by law, from precedents of similar limitations in *Scotland* which are in perfect accordance with the law.

It appears that there are only six instances (including the Earldoms of *Oxford*, *Wiltes*, and *Devon*) in which there have been grants of English peerages with limitations to heirs male. The other cases are the baronies of *Hoo* and *Hastings*, *Richmont Grey*, and *Egremont*, all of them in the reign of *Henry* VI. In none of cases (except that of *Oxford*) has there been any succession, although in all of them the original grantees sat in Parliament.

Two Irish patents, in the reign of *Charles* I., were referred to in the claimant's case, by which the peerages of *Bandon Bridge* and *Broghill* were created on the same day in favour of the same persons and with exactly the same limitations, being first to *Lewis Boyle* and the heirs male of his body, and for want of such issue to the Earl of *Cork* and the heirs male of his body, and in default of male issue of the body of the said Earl, the honour to remain to the heirs male of the said Earl for ever. It does not appear that this remainder to heirs male ever came into existence, or, if it did, it vested in a person holding a higher title, and sitting in Parliament under it.

The circumstances of each of these cases may satisfactorily account for the absence of any claim to the dignity, without attributing it to the belief that no right of succession existed, but whatever may have been the cause, no occasion of testing the validity of a limitation of this kind ever presented itself until the *Devon Case*.

In considering the patent of creation of the Earldom of *Wiltes*, I will assume that it is in entire conformity with King *Richard's* intentions, and that he had every motive for creating the dignity with the particular limitation assigned to it. The question then presents itself in the simplest and clearest manner, whether it is competent to the Crown to give to a dignity a descendible quality unknown to the law, and thereby to introduce a new species of inheritance and succession? The question put in this way seems to

answer itself. The Crown can have no such power unless there is something so peculiar in a dignity, so entirely within the province of the Crown to mould at its pleasure, that a limitation void as to every other subject of grant is good and valid in the creation of a peerage. No one has pushed the argument to this extravagant length, and yet, if any one limitation which the law prohibits in the grant of property may be applied by the Crown to the grant of a dignity, it is difficult to see how you can stop short of holding that there is no restriction upon the Crown's establishing any order of succession to a dignity, however novel and extraordinary.

It was contended for the claimant that the validity of the patent was shewn by the Earl of *Wiltes* having sat in Parliament, upon which my late noble and learned friend, Lord *Cranworth*, remarked, that "even if the grant were void, the sitting in Parliament would equally take place, because Sir *William Scrope* might have been summoned, and having been summoned, he would sit." To which it was answered, "That he would be summoned only by reason of his patent, and that where there is a patent, and a writ is issued, the writ must be referred to the patent." This is, no doubt, correct, but then if the patent is void, and the writ is to be referred to it, I do not see how the summoning and sitting can render it valid.

But suppose the limitation to the heirs male could not take effect, does it therefore follow that the patent was altogether void? It is argued that it would be so, from analogy to a grant of lands by the Crown with a similar limitation. But it has never been decided that if the limitation, even of a dignity after the grantee's life, is not valid that the grant fails entirely, and will not be good even for the life of the grantee. The King on the creation of the Earldom of *Wiltes* may be considered to have had two objects in view; first, to ennoble his faithful adherent, Sir *William Scrope;* and, second, to make the dignity conferred upon him descend in a particular course of succession. If the King was disappointed or deceived (if that is the correct expression) as to the secondary object of his grant, why was not his primary one of ennobling a favourite subject to take effect? The validity of the creation would not be questioned during the life of Sir *William Scrope.* He would be summoned, and would sit as a matter of course. It could only be after his death, and if a successor appeared to claim the title,

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that the objection to the extension of the dignity beyond the life of the original possessor could possibly arise.

With regard to the dignity now in question, more than four centuries and a half have elapsed from the death of the grantee and sole possessor of the title without any person asserting a claim to it, although for nearly the whole of that long period there has been no impediment to any one, really entitled, coming forward and establishing his right. It is impossible at this distance of time to know the reason of this entire absence of claim, but it may fairly be presumed to have arisen from a belief that the title had in some manner come to an end, either from the invalidity of the course of succession limited by the patent, or from the circumstances which led to the death of the Earl, and the subsequent proceedings in Parliament with reference to that matter.

Much discussion took place at the Bar as to whether the Earl of *Wiltes* had committed treason, and had thereby forfeited his dignity. I think it clearly appears that of treason, strictly so called, he could not be guilty, because he was put to death while *Richard* II. was still sovereign, to whose cause he adhered to the last. Neither does it appear that before the execution of the Earl of *Wiltes* anything took place which can be regarded as a regular judicial trial, although this character was attributed to the proceedings against him in the subsequent Parliament of 1 Hen. 4.

The proceedings of this Parliament are entered upon two rolls. The first of these is headed "*Rotulus Parliamenti*," &c., and contains entries of proceedings which are clearly in and by the Parliament. The other, in which alone there are entries relating to the Earl of *Wiltes*, is headed "*Placita Coronæ coram domino Rege in Parliamento suo.*"

This Roll begins with a recital calling to remembrance that in the Parliament held on Monday in the Feast of St. Faith the Virgin, the Commons of the Parliament shewed to the King that it was not to be supposed that the defaults and misdeeds for which *Richard*, the late King of *England*, had been deposed could have been committed without the advice of those who were about his person; and that there were certain records made in the Parliament held in the twenty-first year of his reign, which records, as the Commons thought, made mention of the misdeeds of the King and the names

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of those who were in fault, and they prayed that the records might be brought into Parliament and read, and that the answers of certain Lords present might be heard. The Roll then states the answers given by the Dukes *D'Aumale, Surrey,* and *Exeter,* the Marquis of *Dorset,* and the Earls of *Salisbury* and *Gloucester,* and proceeds thus: "Upon which the Lords in this Parliament, by assent of the King, deem, and adjudge, and decree that the Dukes *D'Aumale, Surrey,* and *Exeter* that be here present, and appellants, lese and forego for them and their heirs the names that they have now as Dukes, and the worship and dignity thereof; and the Marquis here present for him and his heirs the name of Marquis; and the Earl of *Gloucester* here present the name of Earl and the worship thereof" (1).

If the Earl of *Wiltes* had been living at this time it is impossible to doubt that he, like those named, would also have been expressly deprived of his title of Earl without the Parliament troubling itself to consider whether the creation of his dignity was valid or not. And as the Parliament was proceeding with the utmost severity to confiscate everything previously belonging to the Earl which his death had left within its reach, it does not seem probable that it would intentionally have permitted a dignity which, in its opinion, he had degraded, to be open to a successor if it had supposed that there was any right of succession existing.

It seems probable that the Parliament considered that the proceedings which terminated in the execution of the Earl for acts which were "against the common good and profit of the realm" carried with them a forfeiture of the dignity, for he is never styled Earl of *Wiltes,* but *William Lescrope,* Knight, and by that name the proceedings against him were affirmed.

This portion of the Roll is in these terms: (2) "Wednesday, the 19th day of November, in the same Parliament, the said Commons prayed the King that the pursuit, arrests, and judgments which had been made against *William Lescrope,* Knight, *Henry Green,* Knight, and *John Bussy,* Knight, might be affirmed in this present Parliament, and held for good. That the King was unwilling to disinherit any one of his heritage, franchise, or other right except those who had acted against the common good and profit of the

(1) Min. of Evidence, p. 203. (2) See *ante,* p. 129.

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realm, of whom the King held the said *William, Henry,* and *John* for such, and guilty of all the ills which had happened in the kingdom, and for that reason he willed to have and hold all the lands and tenements of the said *William, Henry,* and *John,* as well within the kingdom as elsewhere, by conquest. And thereupon the opinion of all the Lords Temporal was asked as to the above pursuit, arrests, and judgments, who all with one accord said, that the said pursuit, arrests, and judgments, and everything which was done as aforesaid, were good, and they affirmed them as good and profitable, and upon that the Commons thanked the King for his righteous judgment, &c."

This proceeding was not an Act of Parliament. It is entered upon a roll quite distinct from the Parliament Roll, and has its own appropriate heading of "Pleas of the Crown before the King in his Parliament holden at *Westminster.*" But it is a solemn adjudication pronounced by the King in open Parliament at the prayer of the Commons, and with the advice of the Lords Temporal, against the Earl, by the style of *William Lescrope,* Knight. It is not a judgment of forfeiture of the dignity as in the case of the Dukes, Marquis, and Earl previously mentioned, for Parliament evidently thought that none was left to forfeit; and by affirming the pursuit, arrest, and judgment against the Earl to be good and profitable, they virtually determined that he was rightly proceeded against as *William Lescrope,* Knight. It seems to me to be immaterial to consider the question raised by the counsel for the claimant, whether, if the original proceeding against the Earl was illegal, the subsequent affirmance of it could give it validity. The real point to be determined is the effect of the adjudication in Parliament upon the succession to the dignity.

It certainly seems to have been considered at the time, and for centuries afterwards, until the present claim, that, upon the death of the Earl, the Earldom had ceased to exist. Shortly after his death a petition was presented by his widow, praying that the King would grant her a pension. In this petition she calls herself not Countess of *Wiltes* but "*Isabel,* who was the wife of *William Le Scrope.*" The petition is indorsed in Norman French to this effect: "The King, of his special grace, and with the advice and consent of the Lords Spiritual and Temporal, and at the special

prayer and instance of Commons in open Parliament, has granted to *Isabel*, who was the wife of *William Lescrop*, £100, to be taken annually at the Exchequer during the life of the suppliant."

From the form of the question when the petition was about to be put in evidence it appeared as if it were contained in the same Roll of the Parliament of the 1 Hen. 4 upon which the proceedings as to the seizure of the Earl's estates are entered. This is a mistake. It is a separate Petition addressed to the King, and the Lords and Commons in Parliament assembled. From the terms of the indorsement on the Petition it must, I think, be regarded as a grant by Parliament, and it certainly shews that in the opinion of the widow, of the King, and of the Parliament, if the Earldom of *Wiltes* had previously existed it had in some way or another come to an end. Some reliance was placed by the claimant on an entry in the Pell Issue Roll (1) of the payment of the sum of £100 to the widow, described as "*Isabel*, who was the wife of *William Lescrop*, Knight, late Earl of *Wiltes*, deceased," and also upon recognitions of the title in certain grants of the lands and money of "the late Earl of *Wiltes*" during the reign of *Richard* II.

These circumstances appear to me to be of very little value in the determination of the question before the Committee. That *William Lescrope* had borne the title of Earl of *Wiltes* there can be no doubt. The question is whether, at all events, even assuming that the dignity was legally created, it did not end with his life.

From the time of the death of the Earl to the present claim, as already observed, not the slightest recognition of the title has ever occurred. The only possible way of accounting for this is the belief of those who would have been entitled to succeed that no right of succession remained. What other reason can be imagined for the title not being assumed by *Roger*, who was heir male of his brother, and clearly entitled to succeed if the limitations were good. There could have been no apprehension that King *Henry* would have resented this assumption. *Roger*, the brother, had been on his

(1) It seems doubtful whether the payment thus recorded relates to the sum granted in Parliament, or to money given by the King himself out of the property of the late Earl. The amount is the same, but the Pell Issue Roll (Min. of Evidence, p. 50) describes it thus: "c.li quas dcūs dñs ñr rex de consensu *consilii sui* dce Isabelle libaꝛ manꝺ hend *de dono suo de bonis ꝺci nup comitis in manu ꝑꝺci dñi reg* existent, &c."

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side, his favour was shewn to the widow of the Earl in the grant of the annuity, and there is no ground to suppose that if the title had been thought to be still existing it might not have been claimed by the lawful successor with perfect safety. If *Roger* were deterred from claiming the title, and those who came after him had (as it was said) long minorities which prevented the assertion of their right of succession, there were repeated instances afterwards of persons who were clearly heirs male of the grantee, and who were actually sitting in Parliament as Lords *Scrope*, as to whom no impediment of any kind can be suggested.

Whatever difficulty, therefore, there may be in ascertaining the exact effect of the proceeding against the Earl of *Wiltes* with reference either to his condemnation and execution, or to the affirmance as good and profitable of what had been done against him in the Parliament of 1 Hen. 4, it clearly appears from contemporaneous acts and acknowledgments, and from the long submission of persons who would have been entitled to the Earldom, that it was a generally admitted fact that the dignity had come to an end upon the execution of the Earl. However violent and irregular the whole of the proceedings may have been, and the affirmance of them in Parliament of questionable propriety, yet as all persons who had a right to dispute their validity for more than four centuries never seemed to doubt that they had operated as an extinguishment of the title, it seems to me that it would be improper for this Committee, in the obscurity which surrounds the proceedings, to conjecture that in the forfeiture of everything belonging to the Earl of *Wiltes* which was left to forfeit, his Earldom was spared, and permitted to continue as an hereditary dignity.

I should have been prepared to decide against the claim upon this ground, even if I had thought that the grant of the title in succession was originally valid. But I feel bound to state the opinion, to which after an anxious and careful consideration I have been led, that whatever may have been the right to the Earldom, of *Wiltes* of *William Lescrope* during his life, (and, as I have already said, I see no reason why the title to this extent should not have been conferred by the grant,) yet as the prescribed course of succession was one unknown to and unsanctioned by the law of *England*, and which nothing but an Act of Parliament could establish, the

Earldom of *Wiltes* ceased to exist at all events upon the death of *William Lescrope*, and the claim of a right of succession to the dignity necessarily fails.

LORD REDESDALE:—

My Lords, after a careful consideration of the evidence it appears to me that this claim must be considered as already *res judicata*.

The record of most importance in the consideration of it is that found in the rolls of Parliament of the 1 Hen. 4, under the head of "*Placita Coronæ coram domino rege in Parliamento suo.*" These proceedings are not in accordance with present practice. The Commons petitioned the King that the prosecution, arrest, and judgment, and whatever was done against *William Le Scrope*, chivaler, *Henry Green*, chivaler, and *John Bussy*, chivaler, should be affirmed in the present Parliament, and held to be good. The Lords Temporal alone were consulted.

A question has been raised whether this is to be considered an Act of Parliament or only a record of certain proceedings therein. In the latter sense it cannot be held to be less than a judicial decision of the highest Court in the realm, affirming that the proceedings against *Scrope, Green,* and *Bussy,* were good. As regards *Scrope,* it is obvious that this involved the decision as to whether he was rightly tried and convicted with the others as a commoner. It can hardly be doubted that when arrested he claimed, as Earl of *Wiltes,* to be tried by his peers, and that this was refused. That he was held to be a commoner is clearly proved by his being called *William Le Scrope* throughout these proceedings, and all the collateral evidence shews that this must have been on account of the invalidity of the original grant, the terms of which were well known, and had probably been commented on by the lawyers at the time as novel and void, unless affirmed by Parliament, as in the *Oxford Case.*

It is important to notice that in the record there is not any mention of attainder to be confirmed. His offence against *Henry* at *Bristol* could not have been considered high treason, and the statement in the record leads to the conclusion that the charge against him and the others was that they had "opposed themselves to the good purpose and common profit of the realm," for which, being

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conquered, they were condemned and executed, and these were the proceedings which the Commons prayed the King might be declared good. *Richard* Lord *Scrope*, the father, appeared before Parliament, and prayed that nothing done in the Parliament should disinherit himself and children. He was asked if he admitted that all that was done against his son *William* was good, which he acknowledged, and the King informed him that neither he nor his living children should lose their lands, for that he held him for a loyal knight, and had always done so. Moreover the King declared that the statute made before those times, "*Qe nully forface apres sa morte*," &c. (that no one forfeits after his death), was in force, and that the ordinance and declaration in the Parliament did not prejudice it, because Sir *William* and the others had judgment passed on them during their lives.

The Lords Temporal were asked to affirm the proceedings, which they did unanimously, and thereby declared that *William Scrope* was rightly tried as a commoner, which could only be because they held that the grant of the Earldom of *Wiltes* was void *ab initio*. It appears to me that no other conclusion can be come to after carefully considering this record. He must have been treated as Earl of *Wiltes* at the time of his death if the grant had been valid: that the Lords held that he was not Earl of *Wiltes* is proved by his being designated as *William Le Scrope* throughout the record. In the grant of the *Isle of Man* to the Earl of *Northumberland* he is designated as *William Le Scrope*, chivaler, and in the grant of that island to Lord *Stanley* in the 7 Hen. 4, he is again mentioned as *William Le Scrope*, chivaler, and the Earl of *Northumberland*, who had forfeited the island by his rebellion, is mentioned by his title, proving that the omission of the title of Earl of *Wiltes* was not owing to forfeiture. The Petition of his wife, in which she calls herself the widow of Sir *William Le Scrope*, and not Countess of *Wiltes*, confirms this view of the case. If he had ever been lawfully Earl she must have been Countess. The brother not claiming the title affords another proof. The King had declared his father to be and to have been a loyal knight. He was one of the living children whom the King declared should not lose their lands. It must farther be borne in mind that this question particularly affected the peers, for if Sir *William* was Earl of

Wiltes they determined that a peer might be lawfully degraded and tried by an inferior Court.

Against all these important documents and facts, two notices of money orders and payments in the 23 Rich. 2, after that King was in the hands of the Duke of *Lancaster*, and two in the 1 Hen. 4, in which he is called *William Le Scrope*, late Earl of *Wiltes*, were brought forward as evidence of the recognition of the title by *Henry* IV. Comment on the argument adduced from these entries appears unnecessary.

I decline to express any opinion on the legal question arising from the decision on the *Devon* peerage. It is unnecessary that I should consider it at all in my view of this case. It is admitted as settled law that a man cannot give lands to another and his heirs male for ever so as to cause the lands to descend only to males, and that if the Crown was to make such a grant it would be void. The lawyers in *Richard* II.'s time may have held, as the Judges in that of *Charles* I. appear to have held, that this rule of law applied to titles as well as lands. The restoration of the Earldom of *Oxford* with that limitation, only five years before, had been by Act of Parliament. The charter granted to that Earl immediately after (which I imagine was obtained by him to secure a claim to the title in the event of the proceedings of that session being declared void by any subsequent Parliament) expressly states that the restoration with that limitation was made with the assent of Parliament. Under these circumstances the grant of the Earldom of *Wiltes*, with a similar limitation, without such assent, could hardly have escaped comment from the lawyers; and if generally condemned by them as void, a good reason is found for King, Lords, and Commons, in the succeeding reign, refusing to admit its validity. As *William Le Scrope* was not attainted, the conquest, in right of which alone the King claimed his lands, could not have deprived him of his title, if lawfully held by him; and the farther declaration of the King in the record, that by this conquest he did not desire "to deprive any of their inheritance, franchise, or other right, which they ought to have by the good laws and customs of the realm, except those who had opposed the good purpose and common profit of the realm," in reply to Lord *Scrope's* petition that nothing done in Parliament should disinherit him and his

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children, clearly left the succession to the Earldom open, if it ever existed, and if the limitation was held to be good.

It appears to me impossible to pass over this record (which is the most important one of the time which has come down to us) without determining why *William Scrope* was not therein recognised as Earl of *Wiltes*. The attention of the counsel for the claimant was particularly directed to the point, and he failed altogether to give any satisfactory explanation of it.

For the reasons I have given, I am of opinion that the invalidity of the grant was then decided, and that whether that decision was right or wrong, whether formal or informal, according to our present notions, it would be a most dangerous precedent if this Committee should determine that a decision as to the validity of a peerage come to by the House between four and five centuries ago, and acquiesced in by the person who could then have claimed it, if rightly granted, may now be disputed and set aside.

LORD COLONSAY:—

My Lords, the question we have to determine is the validity of the claimant's demand to be found entitled to the Earldom of *Wiltes*.

He says, first, that by charter in 21 Rich. 2, Sir *William Scrope* or *Le Scrope* was created Earl of *Wiltes*, "to have to him and his heirs male for ever;" he says, secondly, that he is heir male general of that Sir *William Scrope;* and he says, thirdly, that consequently he is entitled to succeed.

On the second of these points I think that the claimant has been successful,—that he has sufficiently proved his descent. It is unnecessary for me now to go through the steps of the pedigree. I think he has also proved that such a charter as he describes was granted by *Richard* II., and that Sir *William Le Scrope* sat in Parliament as Earl of *Wiltes*, and was so described by the King on certain occasions referred to.

But it still remains to be considered whether the grant was valid, and whether the dignity it professed to confer has been effectually transmitted.

The grant was in remarkable terms,—I do not say in terms of which examples are not to be found, but in terms unusual; and

the history of the case is peculiar. The grant was made by *Richard* II. in the twenty-first year of his reign, *i.e.* in 1398; and in 1399, while the King was in *Ireland*, the Duke of *Lancaster* landed in *England*, and raised his standard.

Sir *William Le Scrope*, who was Lord Treasurer, and two other knights of the names of *Green* and *Bussy*, counsellors of the King, had fled to *Bristol*, where they were all three taken prisoners, and very summarily tried, condemned, and beheaded. The King having returned from *Ireland*, found himself unable to cope with the forces and power of *Lancaster*. He gave up the contest, and *Henry* IV. ascended the throne.

In the first year of *Henry* IV., as might have been expected, proceedings were taken with reference to some of the persons of distinction who had been among the counsellors of the late King. Some of these proceedings appear to have been taken at the instance of the Commons. The record of the proceedings is in a Roll headed "*Placita Coronæ coram domino rege in Parliamento suo.*"

The proceedings appear to have been of a judicial character before the King and the Lords Temporal. The entry on the record relating to *William Le Scrope* and the two other knights has been already read, and therefore I need not read it again.

It is observable that throughout these proceedings *Le Scrope* is never spoken of as Earl of *Wiltes*, but always as *William Le Scrope*, Knight, and the pursuit, arrest, and judgment against him as *William Le Scrope*, Knight, are affirmed to have been good. It is true that he had not been guilty of treason in the strict sense of that term, for *Richard* II. was still alive, and reigning, when *Le Scrope*, who was one of his adherents, was beheaded, by authority of *Lancaster*, for acts described as "against the common good of the realm." We may be of opinion this execution was an arbitrary and even unlawful act; still it is true that the highest Court in the realm, having sat in solemn judgment upon it, did not hold it to be so, and did not recognise him as Earl of *Wiltes*, but only as Sir *William Le Scrope*, Knight, and that the Lords Temporal did not hold that one of their number had been tried by a tribunal not of his peers. It seems to follow that at that time it was held that the grant of the Earldom was either invalid as regards at least the descent, or had ceased to have vitality.

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All the other circumstances, at the time and subsequently, point in the same direction. His widow petitioned for and obtained a pension, not calling herself Countess of *Wiltes* or widow of the Earl of *Wiltes*, but describing herself and recognised as widow of *William Le Scrope*. His brother did not take up the title, nor did any subsequent heir do so, although there does not appear to have been any sufficient reason why that should not have been done, if it was understood to be a subsisting Earldom. But the fact is, that from that time forward there has been no claim to or recognition of the title.

It was said on the part of the claimant that if the grant was not invalid it could not become extinct merely because the title had not been claimed by any of those entitled to claim it, and that its invalidity had not been established.

I have already said that the grant was of an unusual character. Reasons have been assigned for the unusual character of the grant, arising out of the peculiar favour in which Sir *William Lescrope* was held by the King. I assume that this explanation is correct, and that the King may have intended to confer an unusual mark of favour. Still the question would remain whether that was effectually done. It is said that a precedent had occurred five years before then, in the case of the Earldom of *Oxford*, given to *Aubrey de Vere*, and his heirs male for ever. But that does not appear to have been a mere act of the King, but rather to have been a restoration by the King in Parliament of a forfeited Earldom, with a new remainder. The charter was not granted till three weeks afterwards, and was the sequel of the Parliamentary proceeding. That must have been well known and understood by those who dealt with the case of *William Lescrope* so soon thereafter.

Some later patents were referred to. It does not, however, appear that in any of them there was any succession, or at least any succession that brought under consideration the effect due to such a patent. But there are not wanting expressions of opinion by eminent lawyers of former times to the effect that a patent in the terms we are now considering would not be valid, and that the case of *Oxford* owed its validity to the intervention of Parliament. It is, therefore, not wonderful that this view of the law should have prevailed in reference to the case of Sir *William Lescrope*.

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The point was raised not long ago in reference to a patent in very similar terms in the case of the Earldom of *Devon*, and in that case the validity of the patent was sustained. If I am right in holding that, as regards the particular grant now under consideration, the matter was concluded by the proceedings in 1 Hen. 4, the decision in the case of *Devon* could not affect my judgment in the present case, however much I might be disposed to concur in that decision. I may, however, with all respect for the eminent Judges who advised the House in the *Devon Case*, be permitted to say that the reasons by which they supported their opinions are not to my mind very satisfactory. If it had been the case of a Scotch peerage I should have had no difficulty in supporting the grant. Such grants are well known to the law of *Scotland*, both as to lands and dignities; but as regards land, the laws of *England* and of *Scotland* are not the same in reference to what is here called the limitation, and is there called the destination, and I am not satisfied that they are the same as regards hereditary titles of honour. In *Scotland* the law in this matter is substantially the same in regard to land and to peerages. In *England* it appears to have been made a question whether the law is the same or different in regard to land and to peerages, whether a limitation which would not be effectual in regard to land would be effectual to regulate the descent of a title of honour. If not, then the conclusion arrived at in the *Devon Case* would appear to have been at variance with principle.

It was strongly pressed upon us that the decision in the *Devon Case* is a precedent which must be followed in all future cases. I think that argument was pressed rather too far. While I think that such a precedent is not to be lightly disregarded, but, on the contrary, is entitled to the greatest consideration and respect, I do not look upon it in the same light as a decision of the House sitting as a Court of Law. It is, no doubt, when accepted by the House conclusive in the particular case, but, for the reasons assigned by my noble and learned friend, it is not binding on future Committees, or on the House, in all future cases. The noble and learned Lords who pronounced that decision were not making a rule for any other case; and even if they had thought otherwise, which I do not think they did, I could not have concurred in the

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opinion that an error (if it was an error) into which one Committee for Privileges had fallen was to be perpetuated, so as to affect all future cases.

The result, then, at which I have arrived is, that any question as to the Earldom of *Wiltes* must be held to have been concluded in the beginning of the reign of *Henry* IV., and cannot now be opened up, whatever may be the weight due to the decision in the *Devon Case*. That even if the question as to the Earldom of *Wiltes* had not been concluded by what took place upwards of four centuries and a half ago, but had still been open, the decision in the *Devon Case* would not have been binding on us, or have precluded us from reconsidering the point disposed of in that case. That if we had to reconsider the point and to pronounce upon it, I cannot say that I am yet satisfied with the reasons that were assigned for that decision.

By the Lords Committees for Privileges, to whom it was referred to consider of the Petition of *Simon Thomas Scrope*, of *Danby-upon-Yore*, in the county of *York*, Esquire, to Her Majesty, praying Her Majesty to be graciously pleased to cause a Writ of Summons to Parliament to be directed to him as Earl of *Wiltes*, in accordance with the limitation of the letters patent dated the 27th day of September, in the twenty-first year of the reign of King *Richard* II., in the year of our Lord 1397, creating Sir *William Scrope*, Knight, Earl of *Wiltes*, together with Her Majesty's reference thereof to this House, and the Report of the Attorney-General thereon, thereunto annexed:

THE COMMITTEE reported to the House

That it is the opinion of this Committee that the Petitioner hath not made out his claim.

Lords' Journals, 7th of May, 1869.

Solicitors for the Claimant: *Slaughter & Cullington.*
Solicitor for the Crown: *The Solicitor of the Treasury.*

THE DIRECTORS, &c., OF THE HAMMERSMITH AND CITY RAILWAY COMPANY } PLAINTIFFS IN ERROR;

AND

G. H. BRAND AND MARY C. LOUISA, HIS WIFE . . . . . } RESPONDENTS IN ERROR.

1868 *July* 3, 6.

1869 *April* 22; *July* 13.

Railway—Damage from use of.

The *Lands Clauses Consolidation Act*, and the *Railways Clauses Consolidation Act*, do not contain any provisions under which a person, whose land has not been taken for the purposes of a railway, can recover statutory compensation from the railway company in respect of damage or annoyance arising from vibration occasioned (without negligence) by the passing of trains, after the railway is brought into use, even though the value of the property has been actually depreciated thereby. (*Diss.* Lord *Cairns.*)

The right of action for such damage is taken away.

Rex v. *Pease* (1), and *Vaughan* v. *The Taff Vale Railway Company* (2), approved.

The headings of different portions of a statute are to be referred to, to determine the sense of any doubtful expression in a section ranged under any particular heading (3). (*Dub.* Lord *Cairns.*)

THIS was a proceeding in Error against a judgment, on a special case, given in the Exchequer Chamber, which had reversed a previous judgment of the Court of Queen's Bench (4). The facts, as set forth in the special case, were these:—

Mr. *Robert Monkhouse Piper* was in his lifetime seised in fee in certain property at *Hammersmith*, and resided there in a house known as *Cumberland House*. He died in October, 1863, having made a will by which his widow, *Mary Catherine Louisa*, became entitled to the property.

The "*Hammersmith and City Railway Act*" (24 & 25 Vict. c. clxiv.) had been passed in the year 1861, and empowered certain persons therein named to make and maintain a railway. The *Lands Clauses Consolidation Act*, 1845, and the *Railways Clauses Consolidation Act*, 1845, were incorporated into this special Act (5).

(1) 4 B. & Ad. 30.

(2) 5 H. & N. 679.

(3) See *Eastern Counties Railway Company* v. *Marriage*, 9 H. L. C. 32.

(4) Law Rep. 1 Q. B. 130; Law Rep. 2 Q. B. 223; 7 B. & S. 1.

(5) 8 Vict. c. 18 (*Lands Clauses Consolidation Act*, 1845) sect. 48: "Jury

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The railway was constructed under this Act, and was completed about August, 1863, and was opened for public traffic in June, 1864. It was then used, not by the Defendants, who constructed the line, but by the *Great Western Railway Company*. No part of *Cumberland House*, or of the lands or premises belonging to it, was taken

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to inquire of and assess the damage or compensation in respect of which," &c. Jurors to take oath that they will "faithfully inquire and assess such compensation *or damage*."

Sect. 49 distinguishes between verdict for money to be paid for the purchase of lands required for the works, or any interest therein, and the compensation "for the damage, if any, to be sustained by the owner of the lands" by severance, "or by *otherwise injuriously affecting such lands by the exercise of the powers of this or of the special Act*," &c.

Sect. 63. "In estimating the purchase-money or compensation, regard shall be had not only to the value of the land, but also to the damage, if any, to be sustained by the owner of the lands," by reason of the severing, &c., "or *otherwise injuriously affecting such other lands by reason of the exercise of the powers* of this or the special Act," &c.

Sect. 68. "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for, *or injuriously affected by*, the execution of the works," &c., the mode of proceeding is directed.

Sect. 69 provides for limited interests of "persons not entitled to sell or convey the lands."

The *Railways Clauses Consolidation Act*, 1845 (8 Vict. c. 20) has this heading:—"And with respect to the construction of the railway and the works connected therewith, be it enacted as follows:"— (Sect. 6.) In exercising the powers given by the special Act to construct the railway and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act and in the *Lands Clauses Act*, and "shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of the railway, or *injuriously affected by the construction thereof*, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise as regards such lands of the powers by this or the special Act, or any Act incorporated therewith, vested in the company," and then follow provisions as to the mode of ascertaining the compensation.

Sect. 16. "Subject to the provisions in this and the special Act, &c., contained, the company may, for the purpose of constructing the railway, &c., execute the following works." The works are then mentioned. "They may do all other acts necessary for making, maintaining, altering, or repairing, and *using* the railway." Provided that, in the exercise of these powers, "the company shall do as little damage as can be, and shall make full satisfaction in manner herein and in the special Act, &c., provided, to *all parties interested* for all damage by them sustained *by reason of the exercise of such powers*."

Sect. 86 gives authority to a company to employ locomotive power, carriages, &c., and to charge tolls for the carriage of passengers and goods.

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for the purposes of the railway. Mrs. *Piper* continued after the death of her husband to reside in *Cumberland House*, and on the 9th of July, 1864, caused to be served on the directors of the *Hammersmith Railway* a notice claiming compensation "for damage and injury done, or caused to be done, and which will hereafter arise and be occasioned to my property, by the exercise by you of the powers conferred on you by the several Acts of Parliament relating thereto, and in the course of, and in, and by, the making and execution by you of the said railway, and of the works connected therewith, and by the working and use of the said railway, and consequential thereon," and the notice went on in the usual form to state the particulars of the compensation claimed. The directors issued their warrant to summon a special jury, and on the inquiry taking place Mrs. *Piper* claimed compensation in respect of the following matters:—1. For the obstruction of light and air and way. 2. For damage to the garden by lime, dust, and smoke in the course of construction of the railway in the lifetime of *R. M. Piper*. 3. For the working of the railway and the running of trains over it after it had been constructed and opened for traffic, which had occasioned and always would occasion vibration, noise, and smoke; the said premises, by reason of their being subjected to such vibration, noise, and smoke, from passing trains, were, and always would be affected, and farther depreciated in value." Evidence was given under all these heads of claim. The case stated that "It did not appear that any structural injury was caused to the house or outbuildings by the construction of the railway; but it did appear, and it was admitted for the purposes of this case, that, by reason of the working of the railway after it had been opened for traffic, the house and buildings were, and would be, subjected to vibration, noise, and smoke from passing trains, and were and always would be affected and depreciated and lessened in value thereby." The evidence in support of this part of the claim was admitted under protest. The Defendants formally objected that the Plaintiff was not entitled to any compensation under the third head of claim, and in order that the question might be conveniently raised, it was agreed that the amount of compensation should be assessed under each head of claim, and this was done accordingly. The third head of claim was thus

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assessed in the verdict, "For vibration from the use of the railway, after construction, as before mentioned, £272."

Judgment was entered up for the whole sum assessed, of which this last item formed part.

Mrs. *Piper* afterwards married Mr. *G. Horatio Brand.* She received the other sums, and her husband and herself, after the marriage, brought an action of debt in the Queen's Bench for payment of the £272.

A special case was prepared under the *Common Law Procedure Act,* 1852, for the opinion of the Court of Queen's Bench, and the question was stated to be: "Whether the said Plaintiff is entitled to have compensation made to her by the Defendants in respect of the matters falling under the third head of claim?"

The case was argued before Mr. Justice *Mellor* and Mr. Justice *Lush,* who held that the claim was not in law sustainable, and that judgment must be entered for the Defendants. It was carried to the Exchequer Chamber, where it was fully argued before Lord Chief Justice *Erle,* Lord Chief Baron *Pollock,* Mr. Baron *Bramwell,* Mr. Baron *Channell,* Mr. Justice *Keating,* and Mr. Justice *Montague Smith.* Before the judgment was delivered the Lord Chief Justice and the Lord Chief Baron resigned their offices, and judgment was finally pronounced by the remaining Judges, when the judgment of the Court of Queen's Bench was (*diss.* Mr. Baron *Channell*) reversed (1).

The case was then brought up to this House on Error. The Judges were summoned, and Mr. Justice *Willes,* Mr. Baron *Bramwell,* Mr. Justice *Blackburn,* Mr. Justice *Keating,* Mr. Baron *Pigott,* and Mr. Justice *Lush* attended.

The *Attorney-General* (Sir *J. B. Karslake*), and Mr. *J. A. Russell,* Q.C. (Mr. *Digby* was with them), for the Plaintiffs in Error, Defendants in the action:—

No negligence is imputed to the Defendants. No structural injury has been done to the Plaintiff's house; and the only question, therefore, is, whether damages can be claimed for something

(1) Mr. Justice *Byles* and Mr. Baron *Pigott* heard part of the argument in the Exchequer Chamber, but left before its conclusion, and did not deliver any opinion.

which is the necessary consequence of the ordinary working of a railway. And there is this additional circumstance, that what is now complained of is not the act of these Defendants, who constructed the railway, but of a company which, under the Act of 1861, has obtained the right to use the railway. Under such circumstances, no compensation is payable. The words of the Act refer only to land taken, or injuriously affected, in the making of the railway, and to that matter they were confined in this House in the case of *The Caledonian Railway Company* v. *Ogilvy* (1). And in order to give any title to compensation, the thing in respect of which it is asked for should be something that, but for the Act of Parliament, would give a right of action. There is nothing of that sort here. No land of this lady has been taken, nor any injury done to land still in her possession. The vibration being the necessary result of the using of the railway, in other words, of doing what the Legislature has purposely and specifically authorized to be done, will not constitute the ground of an action, nor has the *Railways Clauses Act* made it the subject of compensation.

The finding here does not amount to a finding that there was a nuisance. An annoyance may exist, and may be permanent, and yet may not amount to what is strictly held to be a nuisance, nor even to such a nuisance as would give a right to civil damages. [THE LORD CHANCELLOR (Lord *Cairns*) :—The finding is, that the house is depreciated in value.] That alone would not give a right of action. This railway is a legalized highway. It is made under the authority of the Legislature. By the side of this highway was a house, and it was assumed in the argument below that the case was the same as if the house had stood by the side of a field, and the owner of the field had thought fit to open it as a highway. Even that might not give a right of action to the owner of the house. But the two cases are not similar. Here it is not the mere will of the owner of the field which has converted the field into a highway; the Legislature has authorized the construction of this highway, and has authorized, too, the use of locomotives upon it. That is a complete answer to a claim for damages in respect of their use. The Legislature, by the 28 Vict. c. 83, allowed the use of locomotives in the streets of the metropolis. That being so, no

(1) 2 Macq. Sc. App. 229.

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individual possessing a house in the street through which the locomotives passed could have complained of the use as furnishing him with a right to bring an action for damages. The principle which applied to that case applies here. No action would lie, unless it could be shewn that there was wrongfulness in the mode of using the railway, or that some special damage was done to the particular individual, such as the Legislature could not have contemplated. That cannot be said here, for here the alleged ground of complaint arises with relation to the ordinary working of a railway train, which working it was the very purpose of the Act to authorize. Now for the ordinary use of a railway, without negligence, no action will lie: *Vaughan* v. *The Taff Vale Railway Company* (1). *Rex* v. *Pease* (2) seems directly in point. There the making of a railway on a certain line was authorized by an Act of Parliament, and though the line of railway was so near the common highway that the locomotives on it frightened horses going along the public highway, it was held that this interference with the rights of the public, by the ordinary use of the railway, must be taken to have been contemplated by the Legislature, and that consequently no indictment could be sustained for what would otherwise have been a nuisance. It is true that Mr. Baron *Bramwell*, in his judgment in this case in the Exchequer Chamber (3), intimated a doubt as to the authority of that decision. He said that, at all events, it was a proceeding, not for damage to an individual, but for a public nuisance, and the consideration, therefore, might well be that a public benefit was to be balanced against a public nuisance, a consideration which would not apply to a private case. That distinction, however, can hardly be maintained, nor be so applied as to prevent that case from being held to determine the invalidity of the claim here.

Nor can it be insisted, as that learned Baron supposed, that because a special right to compensation under the Act was not given, therefore the right to obtain compensation by an action was not taken away, for the opposite of that doctrine is expressly declared in *Vaughan* v. *The Taff Vale Railway Company* (1), which has been recognised and acted on in many subsequent cases.

(1) 5 H. & N. 679. (2) 4 B. & Ad. 30.
(3) Law Rep. 2 Q. B. 235.

The rule as to the construction of particular provisions in certain statutes laid down by the Court of Exchequer, in *Bryan* v *Child* (1), must be applied here. In that case though, with reference to particular instruments, the most general words, "null and void to all intents and purposes whatsoever," were used, yet it was held that these words were, by force of the general intent of the Act, as explained in the preamble, applicable only to the bankrupt, and not to the assignees. Now here the preamble of this particular part of the Act is the heading, which shews the general intent of the subsequent provisions. That heading relates only to "the construction of the railway, and the works connected therewith," and says nothing at all about any possible inconvenience that may arise from the use of the railway after it has been constructed. The heading here, for the purposes of the general intent, limits and restrains the application of the clauses which follow it.

The object of the Legislature was to confine the claim for compensation to land injuriously affected. But in this case the claim is not for injuriously affecting the land, but the person. The land is uninjured in any way. No part of it is taken; no one part severed from another. The owner claims compensation for a personal annoyance, but that is just what the statute never intended to give. In *Mumford* v. *The Oxford, &c., Railway Company* (2), a reversioner was refused compensation for a personal annoyance, though that annoyance lessened, as it is said to do here, the value of the house. The case of the *Stockport, Timperley, and Altringham Railway Company* (3) does not affect the present, for though compensation was there given for something which did not arise simply from the construction of the railway, but from its proximity to a cotton mill, which created a danger from fire, still there it formed part of the property of a person a portion of whose land had been taken for the construction of the railway, and the rest of whose property was thereby injuriously affected. He therefore clearly came within the words of the Act.

Sir *Roundell Palmer*, Q.C., and Mr. *J. Dixon* (Mr. *Mellish*, Q.C.,

(1) 19 L. J. (Ex.) 264; 5 Ex. 368. See as to this point, *Eastern Counties Railway Company* v. *Marriage*, 9 H. L. C. 32.

(2) 1 H. & N. 34.

(3) 33 L. J. (Q.B.) 251.

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was with them), for the Defendants in Error, the Plaintiffs below:—

All legal principles are in favour of this claim, and only some few authorities appear to interfere with the application of those principles. First of all, whenever there is an injury suffered by any one from an act done for the profit of another, it is clear that, on principle, compensation for that injury ought to be given, and every reasonable and fair intendment is in favour of the right to it. Has that principle been, in this instance, disregarded and rejected by the Legislature. It is submitted that that question must be answered in the negative. Such a denial of a right founded on the plainest principles of justice, ought to be clearly and unmistakably expressed. Here it is not so expressed, but is sought to be inferred. In *Broadbent* v. *The Imperial Gas Company* (1), Lord Chancellor *Cranworth* refused to make such an inference, and declared that a title to compensation might exist on the part of a person no portion of whose land had been taken. His Lordship said:—"The 68th section of the *Lands Clauses Consolidation Act* does not relate to the taking of lands by compulsion, although providing a remedy for persons whose lands are injuriously affected, but not taken; it is found, according to the style and fancy of the Legislature, inserted among those clauses which relate to the taking of lands by compulsion." The Court therefore held that the 68th section of the *Lands Clauses Consolidation Act* had reference to cases where a person whose lands were not taken, was injuriously affected by reason of acts authorized to be done in pursuance of the provisions of a private Act. The 22nd section of the *Lands Clauses Act* is in terms as general as can be used in any statute. It speaks of lands taken, or required, or "injuriously affected by the execution of the undertaking;" and of compensation to be made in respect thereof. "Affected" there must certainly mean every species and mode by which lands may be made to become less in value than they were before the execution of the work. Here it is distinctly shewn that the premises are of less value than they were. In the 48th section the words "damage" and "compensation" are used in the most general and

(1) 7 De G. M. & G. 436, 447–8. See also 7 H. L. C. 600.

unrestrained form; and in the 49th compensation is expressly spoken of, not merely with reference to the taking or severance of lands, but with reference to "otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act." Surely the present case comes precisely within those words. In *The Caledonian Railway Company* v. *Ogilvy* (1) Lord *St. Leonards* seemed to assume (2), that unless some part of the land of a neighbouring proprietor was taken he could not claim compensation for injury occasioned to the rest. But that is clearly an assumption unwarranted by authority, for any person who suffers a special injury in the making of the railway may claim compensation, though no part of his land has been taken. The only question is as to the nature of the injury in respect of which he claims compensation.

Equally general terms are used in the 63rd section, and then comes the 68th, where compensation in respect of any interest in lands "injuriously affected by the execution of the works" is spoken of.

So the 69th section speaks of "compensation for any permanent damage," and the 73rd is equally general as to damage from "the making of the works." The whole tenor of the statute shews that the Legislature intended the expressions to be largely construed. Similar observations may be made with respect to the *Railways Clauses Act*, in the 6th section of which are to be found the words "injuriously affected by the construction thereof." Those words are not, by the heading, restrained to the act of constructing the railway, for they expressly speak of something which must be the consequence of that construction. And then the 16th section speaks of the damages sustained by private individuals by reason of the exercise of the company's powers. These various sections, therefore, fairly justify the argument that if the use of the railway when constructed should occasion injury to any one, that injury shall be the subject of compensation. The case of *Ricket* v. *The Metropolitan Railway Company*, in this House (3), is really in favour of this claim. In the judgment of Lord *Cranworth* in that case, the objection to the claim there made is rested on the ground that the damage was done in the construction of the work

(1) 2 Macq. Sc. App. 229. (2) 2 Macq. Sc. App. 246.
(3) Law Rep. 2 H. L. 175.

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authorized, and was only for "a short and limited period" (1), and that was deemed an answer to the claim on the 6th and the 16th sections. But that assumed that if it was permanent, as it is shewn to be here, there would be a title to compensation. In *In re Penny* v. *The South Eastern Railway Company* (2), vibration from the trains during the progress of the works was held to be a subject for compensation, though Lord *Campbell* was inclined to think it might not be so afterwards. The title to compensation was there declared; the observation which followed may be dismissed as extra judicial. Fairly interpreted, the various sections of the Act shew that every cause of injury which but for the statutory power would be the ground of an action, will be ground for compensation.

The argument here is not affected by those cases in which compensation was refused where the injury complained of was only temporary, as in *Mumford* v. *The Oxford Railway Company* (3), while *Elliotson* v. *Feetham* (4) recognizes the principle that an annoyance which is in its nature permanent, as it is here, would give a right of action, and consequently would establish a title to compensation. But even though the particular annoyance might be one of a temporary character in itself, yet if it was one which was habitually repeated, the title to compensation for it would arise. In *Rex* v. *Moore* (5) such a matter was held to be the subject of indictment, and plainly, therefore, would have afforded ground for an action. If it would be actionable unless its creation was authorized by legislative permission, it would undoubtedly be the subject of a proceeding for compensation when so authorized.

The right to demand this compensation is not confined to a person part of whose land has been taken, *Reg.* v. *The Eastern Counties Railway Company* (6), although, as Lord *Denman* there remarked, the section then under consideration seemed to be "specially directed to the case of land taken, and of some ulterior damage thereupon." But the Court thought that the general intention of the Act must be taken to be to extend the remedy to persons who had suffered injury, although their lands had not been taken.

(1) Law Rep. 2 H. L. 198.
(2) 7 El. & Bl. 660.
(3) 1 H. & N. 34.
(4) 2 Bing. N. C. 134.
(5) 3 B. & Ad. 184.
(6) 2 Q. B. 347.

In *Glover* v. *The North Staffordshire Railway Company* (1), no land was taken, but a power of free access to a house was interrupted, and the Court held that the land was injuriously affected within the *Lands Clauses* and the *Railways Clauses Acts*, Lord *Campbell* there observing, that "when the depreciation is caused by something which, as between the landowner and the company, could be done legally only by virtue of the Act, there can be no doubt that that is a case for compensation under the provisions of the Act." Here it is found that the house is depreciated in value, and, being so, it is, as Mr. Justice *Patteson* observed in that case (2), "much the same as to say that it is 'injuriously affected.'" In *Chamberlain* v. *The Crystal Palace Company* (3) similar expressions were used by Lord Chief Justice *Cockburn*, and there the land was not taken, but certain houses of the Plaintiff were injuriously affected by the construction of the railway; and it was held that the Plaintiff was entitled to recover. *The North Western Railway* v. *Bradley* (4) is an authority to a similar effect. There the injury complained of was, that the beer in the cellar turned sour on account of the vibration of the passing trains, and Lord Chancellor *Truro* dissolved an injunction which had been obtained to prevent the Plaintiff from proceeding at law to recover compensation for that injury.

Lawrence v. *The Great Northern Railway Company* (5), and *Lee* v. *Milner* (6), shew that such a claim as the present is sustainable. And in *Gardner* v. *The London, Chatham, and Dover Railway Company* (7), Lord Justice *Cairns* gave the whole undertaking, when in operation, the character of the work contemplated by the Legislature (8), so as to bring it "when in operation," and not merely when in construction, within the provisions of the statute.

This is, in fact, a servitude imposed on the Plaintiffs' land, and the imposition of that servitude, which is a cause of damage, must be the subject of compensation. The making of the railway in the best possible manner is but an ingredient in calculating the amount of that damage and the consequent amount of compen-

(1) 16 Q. B. 912.
(2) Ibid. 924.
(3) 2 B. & S. 605.
(4) 3 Mac. & G. 336.
(5) 16 Q. B. 643.
(6) 2 M. & W. 824.
(7) Law Rep. 2 Ch. App. 201.
(8) Ibid. 217.

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sation. The title to compensation is clear, and that compensation may be ascertained, although, perhaps, not in so perfect and satisfactory a manner as under other circumstances. *Broadbent* v. *The Imperial Gas Company* (1) may be referred to for the observations of Lord Chancellor *Cranworth* on that subject; and no principle can be adduced to justify the argument that, because the mode of ascertaining the amount of compensation is difficult, therefore none at all is to be given.

Mr. *Russell* replied.

THE LORD CHANCELLOR (Lord *Cairns*), proposed the following question to the Judges:—

Were the Defendants in Error entitled to have compensation made to them by the Plaintiffs in Error for the vibration in respect of which damages were assessed by the jury as mentioned in the special case?

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April 22. MR. JUSTICE WILLES:—

My Lords,—I am of opinion that the Defendants in Error were entitled to have compensation made to them by the Plaintiffs in Error for the vibration in respect of which damages were assessed by the jury as mentioned in the special case.

The admitted relevant facts are found, and are as follow:—The claimant, *Mary*, was seised in fee simple in possession of a house called *Cumberland House*, and its outbuildings; the railway was made so near the house that although no part of the site was taken, and although it did not appear that any structural injury was or would be caused to *Cumberland House* or any of its outbuildings by the construction of the railway, "yet it appeared, and is admitted for the purposes of this case, that by reason of the working of the railway after it had been opened for traffic, the house and buildings were and would be subjected to vibration, noise, and smoke from passing trains, and were and always would be affected and depreciated and lessened in value thereby."

No compensation was assessed in respect of the noise or smoke. Compensation was assessed at £272 "for vibration from the use of

(1) 7 De G. M. & G. 448. 3 Jur. N.S. 221

the railway after construction, as before mentioned," which it must be assumed from the terms of the admission, and in the absence of objection as to the extent of the vibration, would have been actionable but for the statutory powers of the company.

The result is, that the sum of £272 represents the price, estimated by a jury, of a perpetual right acquired by the company to shake the house and its outbuildings by traffic upon the railway, or, as it was well put in argument, the depreciation of the value of the property by a servitude of vibration imposed in respect of the railway constructed by the company.

Such a servitude, if granted by an ordinary conveyance without being limited in respect of the use of a specified dominant property, would probably have amounted to a license only, and not have affected the land in the hands of a purchaser; but as limited to vibration by traffic carried on upon a specified railway, it was properly the subject of grant by way of interest in the servient land: *Rowbotham* v. *Wilson* (1).

Therefore, as soon as the railway was completed and fit for use, there was, by the conjoint operation of the company's Act and the execution of the company's works thereunder, statutorily taken away from whoever had, or should in future have, *Cumberland House*, and transferred to the company as appurtenant to the railway, part of the use and value of the house, and the house was therefore injuriously affected, by the construction of the railway or execution of the authorized works, within the words as within the substantial intention of the compensation section, 68.

No analogy to the use of a road dedicated by a private individual can assist. A private individual could dedicate a road to a limited use, but a private individual could not of his own power dedicate a highway with tolls, nor a railway with the statutory restrictions and privileges.

The cases which furnish the test "No right of action no compensation" are satisfied, because the right of action, which would have existed but for the statute, is taken away by the statute, in respect of the works executed and railway constructed, and to which the law annexes the dominion.

As against the company it must be presumed, and, indeed, it is

(1) 8 H. L. C. 348.

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involved in the admissions, that the railway when made was sure to be used, and the probable extent of that use must have been a subject of proof and consideration in committee, and could in like manner be proved before and considered by the jury in assessing the amount.

The uncertainty of the amount is what made most difficulty to my mind; but I think it must be taken that the depreciation was capable of being calculated, without mere guessing, near enough for practical purposes, quite as near, for instance, as surveyors calculate work to be paid for by measure and value either done or to be done in fulfilment of a covenant to repair, upon which there are often wide differences of opinion which a jury must reconcile.

The case of *The Imperial Gas Company* v. *Broadbent* (1) involved peculiar elements of uncertainty defying calculation.

In the result, I adopt the reasoning of Baron *Bramwell* (with whom Justice *Keating* and Justice *Smith* agreed) in the Exchequer Chamber, being satisfied that there must be either compensation or repeated liability to actions, which latter would defeat the general intention of the Legislature, as well as contradict a series of authorities too convenient and reasonable to bear overruling.

I therefore answer in the affirmative, and in this opinion my Brothers *Keating* and *Pigott*, as also my Brother *Lush*, concur.

MR. JUSTICE LUSH:—

7 Jur N S 279

My Lords,—A careful consideration of the judgments of my learned brethren in the Exchequer Chamber, and of the able arguguments addressed to your Lordships on the hearing of this appeal, has induced me to change the opinion which I expressed in the Court of Queen's Bench, and to come to the conclusion that the Defendants in Error were entitled to have compensation made to them by the Plaintiffs in Error for the vibration in respect of which damages were assessed by the jury as mentioned in the special case.

The complaint of the Defendants in Error was, that "by reason of the working of the railway after it had been opened for traffic their house and buildings were and would be subjected to vibration

(1) 7 H. L. C. 600; 5 Jur N S 1319

from passing trains, and were and always would be affected and depreciated and lessened in value thereby." And I take the jury to have found by their verdict that the premises had, as a consequence of this working of the railway, become less comfortable for occupation, and their value substantially diminished.

It is clear that if, without the sanction of Parliament, a private individual had caused this damage by making the railway upon his own land, and running the trains upon it, he would have been liable to an action from time to time so long as the nuisance continued, at the suit of the party injured. This proposition was not disputed on the argument, but it was contended on behalf of the Plaintiffs in Error that this being a public highway, the Defendants are in the same position as if they had made the railway on their own land, and dedicated it to the public, and in that case they would not have been liable for the nuisance caused by the public in using it. The answer to this argument is, that this is not a highway by dedication; if it were, it would not be, as it is, the property of the Defendants as a company, nor could they receive tolls or any other profit from the public for the use of it, as they now do.

The case assumes that this damage results not from any improper or extraordinary use that is made of the railway, or any negligence or misconduct in the management of the traffic, but from the ordinary use of the line as a passenger line, that being the purpose for which it was authorized to be made. It is therefore to my mind equally clear that the Defendants in Error cannot maintain an action for the damage they have sustained, because the Plaintiffs in Error have only done what their Act of Parliament authorized them to do.

But that authority was given to them subject to certain conditions, and the question is, whether it is one of those conditions that they should pay to persons situated like the Defendants in Error compensation in gross for the damage to their property, which is the direct and necessary consequence of such a use of the railway. This depends upon the construction to be put upon the 18th, 22nd, 49th, and 68th section, of the *Lands Clauses Act*, and of the 6th and 16th sections of the *Railways Clauses Act*.

These sections were so fully commented on in the course of the argument that I do not think it necessary to recite them. It is in

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your Lordships' recollection that their phraseology differs. In some of them the damage for which compensation is to be made is spoken of as damage sustained by reason of "the execution of the works," in another "by reason of the execution of the undertaking," in others "by the exercise of the powers of the Act;" and the 6th section of the *Railways Clauses Act* contains both the latter expression and the phrase "by the construction of the railway."

I cannot assent to the argument that the Legislature in adopting in that section of the *Railways Clauses Act* the expression "by the exercise of the powers of the Act" had any reference to the 86th section, which empowers the company to carry on the business of carriers upon their line, and for that purpose to use locomotives. The same phrase occurs in the 49th section of the *Lands Clauses Act*, and is there evidently used as synonymous with "the execution of the works" in the 69th and other sections; and I cannot doubt that if a special Act were to incorporate all the provisions of the *Railways Clauses Act*, except those which enable the company to become carriers, the liability of the company in a case like the present would be the same. I think that the variances were undesigned, and that the same idea is meant to be conveyed by each form of expression.

The question, then, is narrowed to this: Did the Legislature intend to compensate for damage occasioned by the "making and using" the railway, or for damage occasioned by the "making" only, apart from its use?

As the intention to give the larger measure cannot be collected from the words themselves, we are in the first place to look to the context, and see if we can collect from the general scope and object of the Act, as expressed in its other provisions, what the intention of the Legislature upon this point was, and if we see that it was the intention to give the larger measure, then to determine whether the words in question are sufficient to give effect to that intention.

The *Lands Clauses Act* is designed not for railways only, but for all undertakings for which compulsory powers of taking lands are given. And every special Act which incorporates its provisions designates and fixes the purpose for which the land is to be taken, and the use to which it is to be permanently appropriated; and the companies which are empowered to take it are bound to apply it

to that purpose, and to that purpose only. So much of the general Act as is incorporated becomes part of the special Act, and its language, as part of that Act, becomes pointed to the particular work or undertaking specified, whatever it may be, whether a railway, a dock, a canal, or any other undertaking. It there authorizes the taking of the land for the purpose of, and its conversion into, the particular railway, dock, or canal, in order that it may be used as such. The undertaking is regarded as a working concern, and the idea of its use as a railway, dock, or canal is, in the mind of the Legislature, inseparable from that of its construction. In professing to give compensation for all damage sustained by the owners of the adjacent land by the "execution of the works," or "the exercise of the powers of the Act as regards such lands," (sect. 6, *Railways Clauses Act,*) the Legislature must, as it appears to me, have had in view the ultimate object aimed at, the works when complete and in operation,—the dock, railway, or canal—not abstractedly as a mere excavation, embankment, or reservoir, but in connection with its appropriate traffic, and with the ordinary incidents of a business undertaking.

These considerations lead me to the opinion that the view I took of the Act in the Court below is too narrow a view, and that it is apparent from the context that the Legislature intended to compensate for the use as well as for the making of the railway, and thus to make the new remedy which it gave co-extensive with that which it took away.

Taking this to have been the intention of the Legislature in framing the compensation clauses, we have to see whether the words in question are capable, upon a fair and reasonable interpretation, of giving effect to such intention.

It cannot be said, I think, that they are so clear as to exclude this meaning, but only that they are ambiguous. Taken in their literal and primary sense they would, no doubt, be read as denoting the mere work of construction; and if they occurred in a contract between the company and a person who thereby undertook to make the line this would be their undoubted meaning. But as applied to the subject matter of the special Act, which regards the user of the railway as the end and object of all its provisions, and looks at the adjacent land as it will be affected by that user, I

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think they may, without undue straining, be read as embracing both the construction and the user, as if the expression had been "injuriously affected by the railway" instead of "by the execution of the works," *i.e.* the making of the railway. It seems to me that no violence is done to the language, nor any forced or unnatural sense put upon the words, by holding the latter expressions to be equivalent to the former.

For these reasons I answer your Lordships' question in the affirmative.

MR. BARON BRAMWELL:—

My Lords,—In this case it must be taken that the jurors have found that by the ordinary working of a railway line, by the passing of trains, without negligence or design, by what, in short, is practically necessary (as we are told) for the using of the line by the Defendants and those who pay them for its use, a nuisance will be caused to the occupiers of the Plaintiffs' premises by vibration to such an amount that the occupiers, if without remedy, will pay the Plaintiffs for the occupation from time to time a less sum than they otherwise would, the fee simple or capitalized value of which is £272. For this nuisance the occupiers would from time to time be entitled to maintain actions, *Jones* v. *The Festiniog Railway Company* (1), unless some statute has legalized the nuisance with or without compensation, by which I mean the statutory compensation they have claimed. If the nuisance is so legalized, no action is maintainable, whether or no there is a right to such compensation. On the other hand, if it is not legalized, an action is maintainable; and it is agreed on all hands that, if an action is maintainable, the Defendants in Error are not entitled to have compensation made to them by the Plaintiffs in Error for the vibration, in respect of which damages were assessed by the jury, as mentioned in the special case.

But for the cases I shall refer to, I should be of opinion that such nuisance was not legalized, that the occupiers would be entitled from time to time to maintain actions for the nuisance, that consequently the Plaintiffs would not be entitled to compensation,

(1) Law Rep. 3 Q. B. 733.

and that your Lordships' question should be answered in the negative.

It is for those who say that this nuisance is legalized, and the right of action taken away, to shew it. For this purpose, reliance is placed on the clauses of the *Railways Clauses Act*, 8 Vict. c. 20, and especially on section 86, authorizing the use of locomotives and carriages which will cause the vibration in question. It is said that these clauses shew that locomotives and carriages may be used, and, consequently, that no action nor indictment lies for their use; and no doubt this has been so held in *Rex* v. *Pease* (1), and in *Vaughan* v. *The Taff Vale Railway Company* (2). My Lords, with great respect, I think those cases clearly wrong, and that they have proceeded on an inadvertent misapprehension of the object and effect of the clauses in question. What that object and effect are I will proceed to point out.

The private Act of a railway company whereby it is constituted is its deed of settlement, declaring what are the purposes and objects of the company. It always begins by erecting a corporation for the purpose of making a certain railway. If it stopped there, the company could not act as carriers, nor furnish locomotive power, nor do more than make their railway, and receive tolls for its use. Anything else would be *ultrà vires*, as would now be their keeping an hotel, or having steamboats without special powers for that purpose. Moreover, the Courts of Common Law have held that the powers of these statutory corporations are limited to the purposes for which they are created, and that an agreement for anything else entered into by them is not merely *ultrà vires* and void, but illegal. See *East Anglian Railway Company* v. *The Eastern Counties Railway Company* (3), *Gage* v. *The Newmarket Railway Company* (4), and many other cases. Your Lordships are aware that, for the same reasons, canal companies could not act as carriers on their own canals till an Act of Parliament enabled them to do so. This would have been the situation of the railways but for the clauses in question. Those clauses have no other object or effect, as I submit, than to obviate the objection I have referred to.

Your Lordships will find that they begin with a general heading,

(1) 4 B. & Ad. 30.
(2) 5 H. & N. 679.
(3) 11 C. B. 775.
(4) 18 Q. B. 457.

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"With respect to the carrying of passengers and goods upon the railway, and the tolls to be taken thereon." All that follows this heading is to be construed in reference to it: see *The Eastern Counties Railway Company* v. *Marriage* (1). There is not a word in this heading as to the legalizing or allowing of nuisances. The first of the following clauses, sect. 86, allows the companies to be carriers on their own line, and limits the charges they may make. The "company" wanted no law to enable them to *use* a locomotive, any more than it did to use "other moving power and carriages and waggons," except to avoid the objection of *ultrà vires*. A man may use a locomotive on his soil and freehold, and so may a corporation. They do want, that is to say, unless given, they do not possess, the power to use it so as to be a nuisance to their neighbours. But if this were intended to be given, where are the words? The words are sufficient if meant to give *vires ultrà* those of a company to make a railway, but insufficient if meant to authorize the doing of damage. Besides, the use of other moving power and of carriages and waggons is authorized. In what sense? That a nuisance may be committed by their use without remedy? Impossible, for it was never contemplated they would be a nuisance. Sect. 87 clearly also gives power of contracting with other companies, and has no thought of authorizing nuisances. So sects. 88 and 89, 90, and 91. Sect. 92 gives other companies and persons a right to use the railway with engines and carriages "properly constructed as by this and the special Act directed." The object of this was to define the rights of the public over the line as against the company, not to authorize nuisances. All these sections, down to and including sect. 113, have the same object, namely, regulating the use of the railway by the company and others.

But it is said that sect. 114 shews that the interests of others were in view of the Legislature, and that they made thereby what they thought was sufficient provision for that object. The argument is, with all submission, bad. They provided for this matter certainly. They said, we will not let it be *discussed* whether this is a nuisance. Did they, therefore, say nothing else shall be, or, if it is, it shall be remediless? Certainly not.

Farther, the statutes, the Lands and Railways Clauses Acts, them-

(1) 9 H. L. C. 32.

selves recite that such clauses as are contained in them usually appear in Acts of Parliament authorizing the taking of land and the construction of railways, and that it is desirable to avoid the necessity of repeating them. They ought to have, therefore, no greater or other effect in the general and public Acts than they had in the particular and private. Now it is not supposable that in a private Act, for a particular company, an anomaly so great was to be introduced, as that an actionable nuisance might be committed with no common law remedy, and for the benefit of the company, that the profits might be larger if the nuisance was left without compensation. If it is said that compensation is given, then it is most surprising that in such private Act there is no provision for it in express words. And the same remark may be made on these general Acts. Why, if the common law remedy was to be taken away, are there not express words to that effect? Why, if there is to be a remedy by compensation, are there not express words to that effect? Why, if there is to be no action and no compensation, is so gross and anomalous an injustice inflicted when such pains are taken to give compensation for the slightest injury occasioned by the very fabric of the railway? It seems to me impossible that it can have been *intended* that this damage can be done without any compensation.

One reason only for such a state of things is given. It is said that the railway and the working of it are for the public benefit, and therefore the damage must be done, *and be uncompensated.* Admitting that the damage must be done for the public benefit, that is no reason why it should be uncompensated. It is to be remembered that that compensation comes from the public which gets the benefit. It comes directly from those who do the damage, but ultimately from the public in the fares they pay. If the fares will not pay for this damage, and a fair profit on the company's capital, the speculation is a losing one, as all the gain does not pay all the loss and leave a fair profit. Either, therefore, the railway ought not to be made, or the damage may well be paid for. But farther, though if it were the law and practice to do individuals a damage for the benefit of the public without compensation, no one in particular could complain when it happened to him, as every one would know that he held his property subject to being deprived of it or

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having it injured when it suited the public; still such a law and practice would be highly inconvenient and mischievous. It is, however, idle to discuss such a question, as the Legislature has acted under no such considerations. For if the public benefit is a good reason for damaging a man's property without compensation, so would it be for taking it without compensation The Legislature has made the most careful and minute provisions for the payment of compensation for everything taken, and, indeed, for everything injuriously affected. And it is absurd to suppose that it was *intended* that if a house was damaged to the extent of £1 a year by its light and air being diminished compensation should be given, and that it should not be given where the damage was ten times as great, but was caused by the noise and vibration of the trains. Surely when a reasonable meaning can be given to the clauses relied on it should be adopted rather than one so unreasonable.

It is said that a man might dedicate land as a highway, and no action would lie for the nuisance occasioned by its user. In addition to the other answers given to this, I may add, that the ordinary use of a highway is not a nuisance, affecting either the building or its occupants, to such an extent and in such a way as to be actionable. But if any one continually used the highway with a very heavy vehicle so as to cause such a vibration as is experienced in this case, I apprehend an action would lie against him.

If there is to be a remedy, and it is to be by compensation and not by action, how is the compensation to be calculated? The line may not be used. Its traffic may double. Branch lines may be made. Farther, it is not contended by those who say that the common law remedy is gone, that there is an unlimited right to damage, but only a right to do reasonable mischief, or a reasonable right to do mischief. That is to say, if by going a little slower, or being at a little more expense, or some other inconvenience, mischief can be avoided, it must be. But on what principle is this to be settled? Ten trains a day at twenty miles an hour might be no nuisance. This might accommodate the public and pay a dividend. But fifty trains a day at thirty miles an hour might be a grievous nuisance, though much better for the public and the company. Where is the line to be drawn? Take the case of the

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Plaintiff in *Vaughan* v. *The Taff Vale Railway Company* (1). There the Defendants declared that they went as slowly as they could, and with every contrivance for safety. But they might have had one servant, or ten, or 1,000 at the spot in question, to prevent the grass catching fire and burning the Plaintiff's wood. This would have cost them money, and it was cheaper to burn the wood, or, at all events, on a calculation of chances, better to risk doing so, than to have a sufficient number of servants. But how is compensation to be calculated for such a matter? Moreover, if these Plaintiffs are entitled to compensation, so is the owner of every piece of land near the railway. For though there may be no house on it now, it is possible there would have been; but that is now prevented by the railway, at least to the same advantage as before. Therefore such land is injuriously affected, if this is.

In the result, then, the right of action is not taken away in terms, the right to compensation is not given in terms; the principle on which compensation should be given would be most difficult to settle. Though given, the companies would still be liable to actions for excess, which it would be difficult to define, leaving scope for continual litigation. It is impossible that all remedy and redress are taken away; and the only clauses supposed to indicate this are shewn to have another and different object and effect.

For these reasons I think the right of action not taken away, and the remedy by compensation not given, and that the two cases I have referred to were erroneously decided. I may observe, however, as to *Rex* v. *Pease* (2), that it was not one of private wrong, but of public nuisance. In the latter case if what was done was for the public benefit, the public is at once the gainer and loser, and the one may in some sense be set against the other, and so it might have been that without an Act of Parliament the matter complained of there would have been no public nuisance. But the present is not the case of a public but of a private nuisance, where the loser and gainer are not the same to the same extent. In that case also the point I present to your Lordships was not mooted. It was not noticed that the clause was necessary to avoid the objection of *ultrà vires*. Nor was it used by the counsel for the Plaintiffs in Error before your Lordships, because though it would

(1) 5 H. & N. 679. 4 Jur. N.S. 1302 (2) 4 B. & Ad. 30.

6 Jur. N.S. 799

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relieve them from the present claim, it would do so at the expense of leaving them subject to actions from time to time.

It is said that *Rex* v. *Pease* (1) has been so long decided, and so many railways have been made on the supposition that it was law, that it must be set right, if wrong, by legislation only. That it gives rise to great difficulties I think I have shewn. I believe it has not been acted on; compensation under the compensation clauses has not been given as it ought to have been if *Rex* v. *Pease* (1) is law. This is the first time the question comes before your Lordships, and it cannot be said that railway companies have allowed such compensation to be awarded against them without appeal. So, also, juries in actions have found negligence in railway companies as they ought not to have done if that case is not law, and compensation ought to have been given. As to railway traffic being stopped by injunction, I apprehend injunctions would not be granted in such cases.

I have deemed it my duty to bring these cases before your Lordships. If your Lordships hold them to have been rightly decided, or think they are so far settled law that they must be acted on, then it seems to me they shew that the judgment below was right, and that your Lordships' question should be answered in the affirmative. Because, for the reasons I have given, I am sure the Legislature did not *mean* to leave persons whose property will be injured, as in this case, without remedy by action, or by claim for compensation; and I think it right to hold any words that are capable of it, to mean to give a remedy by implication. Of course we must not put a meaning on words which they cannot bear, merely in order to remedy an injustice, however gross. But I think the words "injuriously affected by the construction thereof," and "full compensation for all damage sustained by reason of the exercise as regards such land of the powers," &c., may, and, where it is estatablished there is no right of action, must, have the effect of giving compensation for the damage. For according to the case of *Vaughan* v. *The Taff Vale Railway Company* (2), immediately on the construction of the railway, and "by the construction thereof," a right accrued to do this damage. How then can it be said that the lands are not injuriously affected "by the construction thereof" if

(1) 4 B. & Ad. 30. (2) 5 H. & N. 679.

they thereby became subject to this? They immediately come under a servitude, as Mr. *Mellish* put it in the Court below. Suppose it had been enacted expressly that on the construction of the railway there should be a right to use it so as to create a nuisance actionable at common law, would not that have been matter for compensation as much as if it had been enacted that the owner should make a grant of such a servitude? But it makes no difference whether it is expressly or otherwise enacted, if it is enacted, as *Vaughan* v. *The Taff Vale Railway Company* (1) shews it is.

As to the argument that the premises are none the worse, but only the occupiers, it is enough to say that the same thing might be said in answer to a claim for compensation for diminished light. It is to be observed that the word is not "in," or "during," but "by" the construction of the railway. Besides, this is a damage sustained by occupiers, by an exercise, as regards these lands, of the powers of the Act.

The opinions I have expressed here I entertained and expressed in the Court below. But feeling there that I was bound by the case of *Vaughan* v. *The Taff Vale Railway Company* (1), I thought the then Plaintiffs entitled to judgment in their favour. Should your Lordships hold those cases to have been well decided, or too settled to be overruled, then, for the reasons I have given, I think the then Plaintiffs entitled to judgment in their favour; otherwise not. I have necessarily repeated what I said there because I am unable to offer anything better to your Lordships, and because I desired to save your Lordships the trouble of referring to what I then said, had your Lordships been minded so far to honour me.

MR. JUSTICE BLACKBURN:—

My Lords,—I have come to the conclusion that the Plaintiffs below have no right to compensation for the vibration mentioned in the special case. I need not say that finding that I stand alone amongst the Judges consulted by your Lordships, I give this opinion with diffidence. My reasons are as follows:—

I think it is agreed on all hands that if a person, not authorized by Act of Parliament so to do, erected a railway or any other

(1) 5 H. & N. 679.

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private road on his own land, and then worked it by running locomotives and trains, or any other species of carriages, upon it, so that the vibration and noise were to such an extent as really to be annoying to a neighbour, that injury would be a nuisance, and that neighbour would have a fresh cause of action against the maintainer of the way every time that the way was so worked as to give rise to the nuisance, and he might, I apprehend, obtain an injunction to prevent the continuance of the nuisance. But if, instead of making and maintaining a private way of his own, the owner of the land dedicated it as a *public* highway, and the public brought traffic on it to such an extent that the noise and vibration seriously affected the neighbours, I apprehend they would be without remedy. The common law would leave them suffering a private hardship for the public benefit.

This distinction may have some bearing on the construction of the statutes (8 Vict. c. 18, and 8 Vict. c. 20), on the true meaning of which I think the present case depends.

And I think that it is agreed on all hands that if the Legislature authorizes the doing of an act (which if unauthorized would be a wrong and a cause of action) no action can be maintained for that act, on the plain ground that no Court can treat that as a wrong which the Legislature has authorized, and consequently the person who has sustained a loss by the doing of that act is without remedy, unless in so far as the Legislature has thought it proper to provide for compensation to him. He is, in fact, in the same position as the person supposed to have suffered from the noisy traffic on a new highway is at common law, and subject to the same hardship. He suffers a private loss for the public benefit.

Now the Legislature has thought fit to authorize the Defendants to make a railway, and by 8 Vict. c. 20, s. 86, "to use and employ locomotive engines and other moving power, and carriages and waggons to be drawn or propelled thereby." And the first question is, whether this is such a legislative authorization of the use of such power as to render all such consequences as inevitably attend it no longer wrongful.

If this were a new matter I should think there was a great deal in what is thrown out by Baron *Bramwell* in his judgment in the Exchequer Chamber in this case; but the contrary was held in

Rex v. *Pease* (1) so long ago as 1832, and acted on in *Vaughan* v. *The Taff Vale Railway Company* (2). And if your Lordships were to reverse those decisions the consequence would follow that any owner of a house or field so adjacent to a railway that the inevitable disturbance from the working of the line amounted to a nuisance might (at least where the railway has not been opened for twenty years) stop the working of the line. So large an amount has been invested in the belief that the trains might be run, even though some mischief to others was inevitable, that I think your Lordships will hold that even if the principle of *Rex* v. *Pease* (1) was originally an error, it has long become *communis error*, and ought to be held to have made the law.

I come, therefore, to the conclusion that, but for the statutes, the Plaintiffs would have had a right of action for the vibration arising from the working of the Defendants' line, and that the statutes have taken away that right of action. The question then arises, whether the Legislature has given the Plaintiffs any compensation; and that must be a question depending on the construction of the statutes.

It has been argued with great force that it is so unjust to take away private rights without compensation that it should be supposed that the Legislature at least wished to give compensation in every case where there was a private injury. But I think it is clear that the Legislature has not adopted this principle. In such a case as that of *The London and North Western Railway Company* v. *Bradley* (3), where the beer in vaults adjoining to the railway turned sour in consequence of the vibration, the owner of the vaults may or may not have had a right to compensation for the injury to his vaults; but the owner of the beer, if a different person from the occupier of the vaults, could have none, for the right to compensation is strictly confined to interest in lands injuriously affected. See *The Caledonian Railway Company* v. *Ogilvy* (4); *Ricket* v. *The Metropolitan Railway Company* (5).

The reason why the Legislature so narrowed the claim to compensation is probably that stated by Lord *Cranworth* in *Ricket* v.

(1) 4 B. & Ad. 30.
(2) 5 H. & N. 679.
(3) 3 Mac. & G. 336.
(4) 2 Macq. Sc. App. 229.
(5) Law Rep. 2 H. L. 175.

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The Metropolitan Railway Company (1), "that any other construction of the clause would open the door to claims of so wide and indefinite a nature." But whatever be the reason, I think it clear that no compensation is given to those whose interest in goods, or whose personal interests, are injuriously affected, except where it can in some way be annexed to the compensation for an injury to land.

No doubt it is often very difficult to say whether an interest in land is or is not injuriously affected. In the present case, however, I assent to the argument so neatly expressed in the reasons in the Appellant's case, that the Plaintiff's house has "become subject to a perpetual servitude," and so her interest in it is injuriously affected.

In my mind, therefore, the question is narrowed to this: Do the compensation clauses in the statutes extend to the consequences of working the railway, and using the statutable powers for that purpose? Or are they confined to the *making* and maintaining of the railway and the works, and the using the statutable powers for that purpose?

I can see many plausible reasons why the Legislature might think fit to adopt the narrower construction. There is the analogy to the hardship which, for the public good, is imposed by the common law on the owner of a quiet villa if his neighbour dedicates the land close under his windows to the public as a highway; it may be leading to *Smithfield Market*. Or they might have thought, as Lord *Cranworth* expresses it, that claims in respect of such damage would be of "a very wide and indefinite character." But I must own that on reading the statutes I do not think that the Legislature deliberately excluded such claims. I think they were not in the contemplation of those who framed the statutes at all; and that if there are words used sufficiently large to embrace such a case it is by an unintended accident. My opinion is based on what may be thought the narrow ground, that no right to compensation exists unless given by the Legislature, and that I can find no sufficient expression of an intention on the part of the Legislature to give compensation for the consequences of exercising the powers given by the 8 Vict. c. 20, s. 86.

(1) Law Rep. 2 H. L. p. 198.

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I am relieved from the necessity of going through the different sections of the Acts, because Baron *Channell,* in his judgment in the Court of Exchequer Chamber (1), has said everything I could wish to say on that head. I will only add, in reference to the argument used in the Exchequer Chamber by Mr. Justice *Montague Smith,* derived from the general words "they may do all other acts necessary for making, maintaining, altering or repairing, and using the railway," which occur in the middle of the 16th section of 8 Vict. c. 20, that in *Jones* v. *The Festiniog Railway* (2) the Court of Queen's Bench (then consisting only of my Brother *Lush* and myself) thought that similar general words in a Railway Act which did not contain any express authority to use locomotive power, left the company at liberty, no doubt, to use locomotives, but on the common law terms, that they must keep in the fire at their own peril. So far as it goes, this confirms the reasoning of Baron *Channell* on this part of the 16th section.

I regret that I am obliged to come to such an unsatisfactory termination; but I think the whole depends on the construction of enactments not sufficiently considered when penned. Opinions will differ on such a point, and it is not capable of much illustration from argument. I can only repeat that in my opinion the *onus* lies on the Plaintiff to shew that the Legislature has given compensation, and I cannot find in the statutes any language which, in my mind, expresses an intention to give compensation for such an injury.

July 13. LORD CHELMSFORD:— 1869

My Lords, this is a proceeding in Error upon a judgment of the Court of Exchequer Chamber reversing a judgment of the Court of Queen's Bench in favour of the Plaintiffs in Error upon a special case.

The question raised for the opinion of the Court below was, whether the Plaintiffs in the action, who are owners of a house adjacent to the *Hammersmith and City Railway,* were entitled to compensation from the railway company for injury to their house from the vibration caused by the passage of trains over the line in the ordinary use of the railway, without negligence, whereby the

(1) Law Rep. 2 Q. B. 235. (2) Law Rep. 3 Q. B. 733.

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house was depreciated in value to the extent, as found by a jury, of £272.

It is necessary, in the outset of the consideration of this case, to point out that the question is confined to the injury arising from vibration, because Mr. Justice *Lush*, in the Court of Queen's Bench, stated that the question was, whether the owners of the house were entitled to compensation "for vibration, noise, and smoke;" and Sir *William Erle*, who heard the whole of the argument in the Exchequer Chamber, but retired from the Bench before the judgment was delivered in that Court (whose opinion is added to the report of the case in the Court below (1)), assumed that the compensation was given for noise and smoke as well as for vibration, and stated that "there was nothing to indicate what was the degree of noise, smoke, or vibration, or what was the amount assessed for any one of these causes separately, and that there was no evidence of any damage to the realty, either in structure or otherwise, from these causes, so that the compensation must be taken to have been given for the supposed discomfort of the inmates of the house." The special case, however, expressly states, with reference to this head of claim, that the jury assessed the amount of compensation "for vibration from the use of the railway after construction" at £272.

There has been great difference of opinion amongst the Judges in the Courts below upon this case, and those whose assistance your Lordships had are not unanimous in their answers to the question proposed to them. It must therefore be regarded as one of nicety and difficulty.

It must be borne in mind that this is not a case in which it was possible to claim compensation before the construction of the railway, nor, indeed, till after its working had commenced, because till then it could not be known whether there would be any vibration injurious to the house occasioned by the passing of the trains. The simple question, therefore, is, whether the Legislature has provided compensation for any damage to land or houses not arising from negligence, but the inevitable consequence of the proper and ordinary use of the railway.

As an introduction to this question I must repeat what I said in

(1) Law Rep. 2 Q. B. 246.

Ricket v. *Directors, &c. of the Metropolitan Railway Company* (1): "The criterion of a party's right to damages under the clauses of the Railways and Companies Acts is correctly stated by Lord *Campbell* in *Penny* v. *South Eastern Railway Company* (2) that 'unless the particular injury would have been actionable before the company had acquired their statutory powers, it is not an injury for which compensation can be claimed.'" To which I must add, as I added there, the observation of my late noble and learned friend Lord *Cranworth* in the case of *The Caledonian Company* v. *Ogilvy* (3), that it does not follow that a party "would have a right to compensation in some cases in which, if the Act of Parliament had not passed, there might have been not only an indictment, but a right of action."

Assuming that before the passing of their Act the Defendants would have been liable to an action for the injury caused to the Plaintiffs' house, it is necessary for the Plaintiffs in the first place to establish that the company's Act has taken away the remedy by action in order to open the way to their claim to compensation.

If the cases of *Rex* v. *Pease* (4) and *Vaughan* v. *The Taff Vale Railway Company* (5) were rightly decided, this question has been determined. It was established by those cases "that when the Legislature has sanctioned the use of a locomotive engine there is no liability for any injury caused by using it so long as every precaution is taken consistent with its use." Mr. Baron *Bramwell*, in his answer to the question put by your Lordships to the Judges, adverting to the above cases, said, "With great respect I think those cases clearly wrong, and that they have proceeded on an inadvertent misapprehension of the object and effect of the clauses in question." And he then reasoned in this manner (6): "The 86th section of the 8 & 9 Vict. c. 20, which gives the company the right to be carriers on their own line, is preceded by a heading 'With respect to the carrying of passengers and goods upon the railway, and the tolls to be taken thereon;' there is not a word (said the learned Baron) in this heading as to the legalizing or allowing of nuisances. The company wanted no power to enable them to use

(1) Law Rep. 2 H. L. 187.
(2) 7 El. & Bl. 660.
(3) 2 Macq. Sc. App. 235.
(4) 4 B. & Ad. 30.
(5) 5 H. & N. 679.
(6) Law Rep. 2 Q. B. 232.

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a locomotive. A man may use a locomotive on his soil and freehold, and so may a corporation. They do not possess the power to use it so as to be a nuisance to their neighbours. If this were intended to be given, where are the words? The words are sufficient if meant to give *vires ultrà* those of a company to make a railway, but insufficient if meant to authorize the doing of damage."

With great respect to the learned Baron we do not expect to find words in an Act of Parliament expressly authorizing an individual or a company to commit a nuisance or to do damage to a neighbour. The 86th section gives power to the company to use and employ locomotive engines, and if such locomotives cannot possibly used without occasioning vibration and consequent injury to neighbouring houses, upon the principle of law that "*Cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit*," it must be taken that power is given to cause that vibration without liability to an action. The right given to use the locomotive would otherwise be nugatory, as each time a train passed upon the line and shook the houses in the neighbourhood actions might be brought by their owners, which would soon put a stop to the use of the railway. I therefore think, notwithstanding the respect to which every opinion of Mr. Baron *Bramwell* is entitled, that the cases of *Rex* v. *Pease* (1) and *Vaughan* v. *The Taff Vale Railway Company* (2) were rightly decided.

The Plaintiffs' remedy by action being taken away, the question remains whether they are entitled to receive compensation from the company for the injury done to their house, a question which must be decided entirely by the provision of the Acts of Parliament relating to the subject. It must be taken as an established fact, that by the use of the railway the Plaintiffs' house has been depreciated in value to the extent of £272, and as they cannot recover the damage they have thus sustained by action, one naturally feels a wish to find that the Legislature has not left them remediless, but has provided for them the means of redress in the shape of compensation to be paid by the company as the price of the right given to them to injure the Plaintiffs' property. It is with this disposition that I entered upon an examination of the clauses of the Acts to which your Lordships' attention was called in the argu-

(1) 4 B. & Ad. 30. (2) 5 H. & N. 679.

ment, and I may say that it was with regret I was unable to find anything in them upon which, in my opinion, the claim to the compensation can be established. It is not that the Legislature has excluded compensation for injury arising as the necessary consequence of using the railway, but that it has not, as far as I can discover, given any right to claim compensation for this species of injury.

The sections of the *Railways Clauses Act* which appear to me to be alone necessary to be considered are the 6th and the 16th sections. I do not think that the sections of the *Lands Clauses Act* which were referred to in the argument are applicable.

The sections of the *Railways Clauses Act* are, as your Lordships know, arranged in order under different heads, which indicate the general object of the provisions immediately following; and these may be usefully referred to, to determine the sense of any doubtful expression in a section ranged under a particular heading.

The heading to the 6th and all the subsequent sections, down to the 30th, and including, of course, the 16th, is "And with respect to the construction of the railways and the works connected therewith, be it enacted as follows." Therefore all the sections to which this heading applies must be taken to have been intended by the Legislature to provide for matters relating to "the construction of the railway and the works connected therewith."

The 6th section seems more closely to confine its provisions to these objects, for it begins by enacting that, "In exercising the power given to the company to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act and in the *Lands Clauses Consolidation Act*," and then it goes on, "and the company shall make to the owners and occupiers of, and all other persons interested in, any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise as regards such lands of the powers by this or the special Act, or any Act incorporated therewith, vested in the company."

It was argued for the Plaintiffs that the injury occasioned to the

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house from the vibration caused by the use of the railway came within the words "injuriously affected by the construction thereof," or, at all events, that it was a "damage sustained by reason of the exercise of the powers vested in the company."

Now, as to the words "by the construction thereof," it seems to me that it would be doing violence to language (even without the limitation which is placed upon these words by the general heading to the 6th and following sections, and the context of the section itself) to extend them to any injury which is not the immediate consequence of the construction of the railway. An instance of damage of this sort occurs in this very case, for the jury gave the Plaintiffs compensation to the amount of £836 for obstruction of light, air, and doorway.

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To argue that, as the injury could not have occurred unless the railway had been previously constructed, therefore it was caused "by the construction thereof," is certainly a strong example of the illogical reasoning of "*post hoc, ergo propter hoc*," and would extend to every accident or injury occurring upon the railway after its construction, which, of course, could not have happened if it had not been constructed.

With respect to the subsequent words in the 6th section, "damage sustained by reason of the exercise of the powers vested in the company," it was argued that they embrace the claim of the Plaintiffs, because the powers vested in the company are not merely for the construction of a railway, but also for the use of it after its construction, being the end and object for which it is made. But again we must refer to the heading of this and the following sections, which limit the provisions they contain "to the construction of the railway and the works connected therewith." And reading the words of the section with reference to these objects, we find that compensation is to be made to the owners, &c., of lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, for damage sustained (not as regards such lands, but) "by reason of the exercise, as regards such lands," of the powers vested in the company. Now, the powers vested in the company "as regards such lands" are to take and use the lands for the purposes of the railway; and to say that the use of the railway after its construction is one of the

powers vested in the company in regard to the lands conveys to my mind no intelligible meaning.

The 6th section of the *Railways Clauses Act* being inapplicable to the Plaintiffs' claim, we must turn to the 16th section to see whether it affords any countenance to it. The 16th section, as already observed, is one of the sections ranged under the heading which immediately precedes the 6th section. As the words "using the railway" are found in it, great stress is laid upon it in favour of the Plaintiffs' claim to compensation. Now, it must be observed that this section begins with the words "it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith hereinafter mentioned, to execute any of the following works," and then follows a specification of different works in detail empowered to be done for the purposes mentioned, ending with a general power to do "all other acts necessary for making, maintaining, altering or repairing, and using the railway." The section then provides that, in the exercise of the powers by this or the special Act granted, the company shall do as little damage as can be, and shall make full satisfaction to all parties interested "for all damage by them sustained by reason of the exercise of such powers."

The counsel for the Respondents argued that this proviso comprehended every description of damage sustained by reason of the exercise of the powers vested in the company; that power is given to them by the 86th section of the Act to use and employ locomotive engines upon the railway; and that the injury to the Plaintiffs' house arose from the use of such locomotive engines, and, therefore, was sustained by reason of the exercise of the company's powers.

It appears to me that this argument claims for the proviso in the 16th section a wider application than is warranted by the purview of the section. The powers specifically conferred by it are expressly referred and limited to "the purpose of constructing the railway." The general power to do all other acts, &c., must be read with reference to this object. If this mode of construing the section by the context is adopted, there will be no difficulty in understanding the words "all other acts necessary for using the railway" to mean, that for the purpose of constructing the railway

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the Defendants may do all acts necessary to enable them to use the railway. This construction appears to me to be aided by the words which are found in juxta-position with the word "using," viz., "making, maintaining, altering and repairing," and it seems to me rather a forced interpretation of language to say that the words the Defendants may do all acts necessary *for* using the railway, mean that they may do all necessary acts *in* using the railway. I think that the proviso must be limited to the powers conferred by the section, and that it is only if in the exercise of those powers damage is sustained, that satisfaction is to be made. The section itself having empowered the Defendants to perform certain works for the purpose of constructing the railway, the proviso enacts that in the exercise of the powers, &c., they shall do as little damage as can be; clearly pointing to the execution of the works to which this section relates, and confining the satisfaction to be made for damage done in exercising those powers. It appears to me that in the reasonable construction of this section it is impossible to hold that it gives any remedy to the Plaintiffs for damage occasioned to their house in the course of using the railway. And there being no other legislative provisions upon which the Plaintiffs' claim to compensation can be founded, except the 6th and 16th sections of the *Railways Clauses Act*, which I have fully considered, and shewn not to apply to that species of injury of which they complain, I am compelled very reluctantly, in a case where real damage has been sustained, though not to a very large amount, to come to the conclusion that the Legislature has not provided for the case of these Respondents, but has left them without remedy, and that the judgment of the Court of Exchequer Chamber ought, therefore, to be reversed.

LORD COLONSAY:—

My Lords, I have, I confess, found this case to be attended with much difficulty, and I think I need not refrain from stating that, when I find that there has been so much difference of opinion in regard to it, and some fluctuation of opinion among the Judges who decided it in the other Courts, and that there is, I believe, a difference of opinion now among your Lordships.

The case arises out of a claim made by a party for injury to her

property resulting from vibration caused by the use of the railway belonging to the Defendants. The claim is rested on the provisions contained in certain statutes, and depends on the construction to be put on those provisions. Two general Acts and the special Act for this railway have been referred to, but I do not understand that in the special Act there is any particular clause that can affect the judgment to be pronounced in this case. The two general Acts are the *Lands Clauses Consolidation Act* and the *Railways Clauses Consolidation Act*, both of which are held to be incorporated in the special Act. It is, I think, upon the provisions of these two general Acts that the question depends. One of those general Acts, to wit, the *Lands Clauses Act*, has, I humbly venture to think, only an indirect bearing on the question. No land belonging to the Plaintiffs, or in which they were interested, was taken or touched by the railway. Their case is not directly within the provisions, as I read them, of that Act. I think it is very clear that unless the case comes within the provisions of the 68th section of that Act it is not within the provisions of that Act at all. Nevertheless, in reading the *Railways Clauses Act*, on which I think the claim of the Plaintiffs must be rested, it is not illegitimate to borrow such light as can be got from the language of the *Lands Clauses Act*, passed at the same time and intended to be co-operative with the *Railways Clauses Act* repeatedly referred to in it, and intended to be incorporated in the special Act for making the railway.

Now, when I have said I do not think that the *Lands Clauses Act* bears on this claim otherwise than indirectly, I may explain that it appears to me that the object of the *Lands Clauses Act* is to give a power to parties engaged in public undertakings to acquire lands. The preamble of the Act says that, "Whereas it is expedient to comprise in one general Act sundry provisions usually introduced into Acts of Parliament relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be made for the same, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings, as for ensuring greater uniformity in the provisions themselves." Then it goes on to enact certain things with regard to the purchase of lands for such undertakings. The provisions of the Act are

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classified under various sub-divisions, with appropriate headings indicating the objects of the clauses in each sub-division. The first of these is, "With respect to the purchase of lands by agreement." That begins with the 6th section, and ends with the 15th section. Then there is another heading: "And with respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows." Then comes another heading: "With respect to the purchase-money or compensation coming to parties having limited interests, or prevented from treating, or not making title, be it enacted as follows." Then another heading: "And with respect to the conveyances of lands, be it enacted as follows." Then another heading: "And with respect to the entry upon lands by the promoters of the undertaking, be it enacted as follows." And so on with regard to various matters as to the taking of lands. I am not speaking at present of the 68th section; but all the other clauses are clauses applicable only to the promoters of the undertaking on the one part, and to the persons from whom lands are to be taken, or who have interests in such lands, on the other part. There is no other class of persons contemplated in that statute. It is not a statute authorizing the execution of any particular kind of works—that is left to other legislation. It is a statute only as to the taking of land. It is intended to regulate the interests of the parties who take the lands, and of the parties to whom the lands belong, or who are interested in the lands to be taken. It provides, on behalf of the parties whose lands are to be taken, not only that they are to receive the value of the lands so taken from them, but that they are also to be compensated for the injury done to any lands held along with such lands, whether by severance or any other injury done to them; but all this has reference only to parties whose lands are to be taken, or who are interested in lands to be taken.

The sections which were specially referred to in the argument were the 18th, 21st, 38th, 49th, 63rd, and 68th; and it will be seen that throughout the whole of them (unless the 68th is an exception) the matter to be dealt with is the interests of the parties from whom lands are taken, or who are interested in such lands, and the interests of the railway company or of the promoters of the undertaking, whatever it may be.

Then I come to the 68th section, which is the only one founded on as of wider application. Now that section is one of the series of clauses placed under the heading "With respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows." That heading covers the sections beginning with the 15th section and ending with the 68th, and then follow the sections "With respect to the purchase-money or compensation coming to parties having limited interests." Section 68 says that: "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith; and if the compensation claimed in such case shall exceed the sum of £50, such party may have the same settled either by arbitration or by the verdict of a jury as he shall think fit." Upon this clause I would, in the first place, observe, that the object in contemplation appears to have been, to prescribe the manner in which claims brought forward under certain circumstances are to be investigated, not to introduce a new class of parties who were not entitled to come in under the previous sections: "If any party shall be entitled to any compensation," he may, in certain circumstances, adopt a particular course; but it is only by reference to the previous sections that you can find out whether he is a party entitled to any compensation; and these previous sections, as I have already shewn, do not recognise a title to compensation as belonging to any person situated as this claimant is. No doubt, with reference to the parties who by the previous sections are recognised as entitled to compensation, namely, the owners or occupiers of or parties interested in lands taken or used, this section contemplates compensation in respect of lands injuriously affected by the execution of the works. But these expressions, "injuriously affected by the execution of the works," occur repeatedly in the previous clauses of the statute, where they are throughout confined to the persons who are to get notice, and from whom lands are taken, and who have also other lands which may be affected thereby. I therefore think that this section of the statute must be read as a part of that class of

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sections which have reference to the persons and subjects mentioned under the heading prefixed to that class of sections; and must be limited in its operation to the persons and matters with which it is thus immediately connected. In the second place, even if it were to be read otherwise, it will be observed that there is a limitation involved in the expression "affected by the execution of the works." I shall afterwards notice the import and effect of such a limitation; but, in the meantime, it appears to me that this section is one of those which have reference to the taking of lands otherwise than by agreement, and has reference only to parties who, under the other sections of the statute to which I have referred, would be entitled to compensation, but who have been omitted or overlooked in the proceedings that may have taken place. It may very well be that parties having certain interests in lands taken, or in lands severed by reason of the taking, may not have been found out at the time, and may have come forward afterwards to make a claim. Notice is required to be given to owners and occupiers, and to all parties known to be interested, but there may happen to be parties interested who have not had notice, or whose interests may not have been known; and it is right that such parties, if they turn up, should have an opportunity of coming forward and making a claim. That this was intended further appears from the circumstance of the section being applicable only to claims exceeding £50 in value. Why should claims of smaller amount be excluded, if the purpose was to give rights of compensation to an additional class of persons? In the preceding sections there are modes given of opening up other claims of absent parties, and settling them by arbitration; but here, when the claims are above £50, the parties are to have the choice of arbitration or a jury. That goes, I think, to confirm the view that this is a clause providing machinery in connection with the previous sections.

But it appears to me that the *Railways Clauses Act* stands upon a different footing. That Act has reference to the particular species of undertaking called a railway, and I think it is in that Act that we may expect to find the materials for dealing with claims in reference to such undertakings. It provides for compensation, not by referring to the *Lands Clauses Act* as containing the rule for com-

pensation, but only referring to that Act for the machinery by which compensation is to be adjudged. It does not take the *Lands Clauses Act* as giving the rule in regard to the parties to whom, or the matters for which, compensation is to be given. On the contrary, it contains its own provisions with regard to these matters, including such cases as we are here dealing with in so far as compensation was contemplated. I think the *Railways Clauses Act* is of wider application than the *Lands Clauses Act* as regards the parties entitled to compensation, and also as regards the matters for which compensation may be given.

The important sections are the 6th and the 16th. Both of these sections are under the heading "With respect to the construction of the railway, and the works connected therewith." The 6th section appears to me to be perhaps, on the whole, the most important and the most general. It says that " in exercising the powers given to the company by the special Act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act, and in the said *Lands Clauses Consolidation (Scotland) Act;* and the company shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise as regards such lands of the powers by this or the special Act, or any Act incorporated therewith, vested in the company."

Under this clause companies are to make compensation to certain parties for certain things. They are to make compensation to the owners and occupiers, and other parties interested in any lands. What lands? " Lands taken or used for the purposes of the railway." So far clear, but it does not stop there. They are to make compensation to the owners and occupiers of lands " injuriously affected by the construction thereof." Now I think it is very clear, that among the owners and occupiers to whom compensation is to be made are the owners and occupiers of lands injuriously affected by the construction of the railway. The Plaintiffs in this case are the owners and occupiers of land injuriously affected by

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the construction of the railway, and are therefore parties comprehended within the class of persons who are entitled to claim compensation. Then what is the matter for which compensation is to be made? It is to be made for "the value of the lands so taken and used." That does not apply to the Plaintiffs' case. But the section goes on "and for all damage sustained by such owners and occupiers by reason of the exercise as regards *such* lands" (which includes the lands of the Plaintiffs), "of the powers by this or the special Act, or any Act incorporated therewith, vested in the company."

Now the claimants of compensation here are owners and occupiers of lands injuriously affected by reason of the exercise of the powers vested by the Act in this company. It is very clear that their property has been injuriously affected by the exercise of the powers vested in the company. It has been injuriously affected by the construction of the railway—the very words of the clause being, "by the construction thereof." Therefore they are persons who, under this clause, are entitled to come forward and make a claim. Their property was in the predicament which this clause contemplates, as property "injuriously affected," and therefore they are persons entitled to compensation.

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Then, the question arises, How far that compensation is to go? Is it to go beyond the measure in which they are injuriously affected by "the construction of" the railway? Is it to be extended to any injury which their property has sustained by the *use* of the railway? Compensation has been awarded to them for the injury done by "the construction of" the railway as affecting the access to their property, and the lights, and so forth. The sum of £800 and odd has been assessed for that. But the question remains whether the statute, by this enactment, provides for compensation to be given for damage sustained not only by reason of the construction of the railway and the works connected therewith, but by reason of the subsequent use of the railway by the running thereon of locomotives, causing vibration. I mean, of course, the vibration unavoidable in the fair and proper use of the railway.

Before expressing any opinion on that question, I should like to refer to the terms of the other section of the statute which has been founded upon in support of the claim. It is the 16th section,

and it says that "subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works." Then the things allowed to be done are specially enumerated:—to construct inclined planes; to alter course of rivers, &c.; to make drains; to erect warehouses, &c.; and to make alterations and repairs. And then there is this general clause, "They may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway." And then, as part of the same section 16, there is a clause of compensation in these terms: "Provided always, that in the exercise of the powers by this or the special Act granted, the company shall do as little damage as can be, and shall make full satisfaction, in manner herein and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers."

Now it appears to me that this provision for compensation has reference to matters such as are comprehended in that same section 16. The question, therefore, comes to be, whether the general expression that they may "*do all other acts necessary for* making, maintaining, altering, or repairing, and *using* the railway," comprehends the claim now made for vibration in respect of the railway being used. I confess it does not appear to me to comprehend this. I think this 16th section has reference altogether to the construction of the railway and to certain things being done to enable the company to construct and repair the railway, and to make it ready or fit for use. I think it has reference to all the acts mentioned in it—the making of drains, and inclined planes, altering and repairing the works, and all other acts necessary for making or maintaining, altering or repairing, and necessary for using the railway; that is to say the acts or operations enumerated, and all other such acts of construction as may be necessary for putting the railway in a condition to be used. That is the interpretation I put on these words and on the 16th section. I do not think that "acts done for using the railway," is the same thing as consequences resulting from the use of the railway.

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Then when I go back to the 6th section I think that it points in the same direction; that is, that the right to compensation given by it is limited to compensation for the injury done by the construction of the railway. It contains nothing whatever as to compensation for the use to be made of the railway. That is not alluded to. If compensation had been intended to be given for an injury of this kind incident to the subsequent using of the railway, by locomotives or otherwise, I should have expected something to be said with reference to it. I should not expect to find in the *Lands Clauses Act* anything with reference to the use to be made of any particular kind of works, because that Act has nothing to do with the kind or character of works to be constructed, or of the uses that may be made of them. But in the other Act, in which we have statutory enactments with regard to a particular class of public works—namely, railways—I should have expected to find something expressed with regard to claims for compensation, not merely for injury done by the construction of the works, but also for injury resulting from the subsequent use of locomotives, if such compensation had been intended to be given. I think one can see reasons why such a wide claim should not have been given; but however that may be, I can look only at the statute itself, and state the construction which I feel myself bound to put upon the statute. This question is no way affected by the circumstance of the particular lands being or not being within the limits of deviation in the special Act. The claim, if maintainable at all, could not have been confined to lands within the limits of deviation, because injury by vibration might equally be done to lands more remote, and the claim would be equally well founded if at all tenable. I think that when the Legislature gives powers under a particular Act the provision for compensation, in so far as intended, would be expressed in that Act, and might with propriety be different, according to the nature of the work to be constructed and the use to be made of it. The Legislature has not yet made clauses in regard to all kinds of public works. It has made such an Act with regard to railways, and I do not find within that Act what I can consider as a right to claim compensation for vibration by reason of the subsequent use of the railway when made. I therefore feel myself under the necessity of concurring in the

judgment that has been suggested by my noble and learned friend.

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LORD CAIRNS:—

My Lords, in a case which certainly is not without difficulties, and which has caused much difference of opinion in the Courts below, and among the learned Judges who have assisted your Lordships, it is not surprising that the same difference of opinion should reach your Lordships' House; and I regret very much that I am unable to concur in the views of my noble and learned friends who have just spoken.

On one part of the case I do entirely concur with them. It appears to me that the effect of the legislation on this subject is to take away any right of action on the part of the landowner against the railway company for damage that the landowner has sustained. It must be taken, I think, from the statements in this case that the railway could not be used for the purpose for which it was intended without vibration. It is clear to demonstration that the intention of Parliament was, that the railway should be used. If, therefore, it could not be used without vibration, and if vibration necessarily caused damage to the adjacent landowner, and if it was intended to preserve to the adjacent landowner his right of action, the consequence would be that action after action would be maintainable against the railway company for the damage which the landowner sustained; and after some actions had been brought, and had succeeded, the Court of Chancery would interfere by injunction, and would prevent the railway being worked—which, of course, is a *reductio ad absurdum*, and would defeat the intention of the Legislature. I have, therefore, no hesitation in arriving at the conclusion that no action would be maintainable against the railway company.

That fact alone would certainly predispose the mind to find, in the enactments upon the subject, compensation given, in some form or other, for the loss which, beyond all doubt, the landowner in such a case sustains. I do not mean to say that it would be safe to strain the words of an Act of Parliament on account of considerations of that kind, but if there be any doubt or ambiguity in the words, the consideration ought not to be overlooked that, beyond

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all doubt, the intention of legislation of this kind is that, in some shape or other, compensation should be made to those who sustain loss or harm by the operation of the parliamentary powers.

It appears to me that it is not necessary in any way to strain the words of the Acts of Parliament in this case; but it is necessary, in the first place, to be perfectly clear as to what Acts of Parliament and what clauses apply. In my opinion, there are two Acts of Parliament which must be looked at for this purpose, both the *Lands Clauses Consolidation Act*, and the *Railways Clauses Act*. My Lords, with regard to the *Lands Clauses Act*, there is no doubt that it is mainly conversant with the taking and purchase of land; but it would be a great mistake to suppose, and it would be at variance with the well settled practice upon the subject to hold, that the Act is confined to the taking of land, and, in fact, the frame of the *Lands Clauses Act* shews that it is even dangerous to trust to the headings which occur at the commencement of these *fasciculi* of clauses, for the purpose of restraining or confining the natural operation of the words which you find in the various clauses under those headings. I will illustrate what I mean by one *fasciculus* of clauses in the *Lands Clauses Act*. The 16th clause is prefaced by these words: "With respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows." The bundle of clauses which occurs under that heading runs on to the 68th section, and if you were to take the literal meaning of the words of the heading, you might expect to find nothing in the clauses that follow, except with regard to the purchase and taking of land, and you might perhaps say that you must interpret every clause that follows as relating to the taking of land, and not to the affecting in any way of land which is not taken. But when we turn to the 22nd clause we find this enactment: "If no agreement is come to between the promoters of the undertaking and the owners of, or parties by this Act enabled to sell or convey or release any lands taken or required for, or injuriously affected by, the execution of the undertaking, or any interest in such lands, as to the value of such lands, or of any interest therein, or as to the compensation to be made in respect thereof; and if in any such case the compensation claimed shall not exceed £50, the same shall be settled by two justices."

It is evident that various classes of land are there spoken of, not merely land which is taken, or land which is required, but also land which is injuriously affected by the execution of the undertaking. And when we come to the 68th clause, the language is still more significant. The enactment is: "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for, or injuriously affected by, the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of £50," then it is to be settled by arbitration, or by a jury, in the way pointed out.

I need not remind your Lordships that under this Act of Parliament, passed as it was many years ago, many hundreds of thousands of pounds—I might perhaps say millions of pounds—have been paid to persons not one inch or one yard of whose land has been taken by the railway company, but whose land has been (in the words of the section) "injuriously affected" by the execution of the works (whatever that may mean—that is another point)—but "injuriously affected" as a matter entirely distinct from the taking of the land. That shews, I think, that the headings of these clauses are not to be relied upon—and many other instances might be given of the same kind inside the clauses themselves—shewing, just in the same way that an Act of Parliament often goes beyond the preamble, that provisions have been introduced in the progress of the clauses going somewhat beyond the short and summary definition in the heading of the clauses. In fact, one of these Acts of Parliament shews that these short headings were introduced merely to ear-mark a set of clauses, and to afford a short and summary way by which they might be introduced, by reference, as enactments into other Acts of Parliament.

I have gone through the sections in the *Lands Clauses Act* which seem to me to be relevant to this matter, and all that I would say more with regard to them is this: As to the 68th section, to which I have referred, I agree that that section does not define the conditions under which the person whose land has been injuriously affected is to be entitled to compensation. It rather

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assumes that the right to compensation has been given in some other enactments, and it contents itself with pointing out the manner in which that compensation shall be obtained. And I may observe that in the present case the whole of the proceedings have been taken under the *Lands Clauses Act*, and indeed it is only under the *Lands Clauses Act* that a jury can be summoned or the aid of arbitration invoked. I therefore commence with the *Lands Clauses Act* as the mode in which compensation is to be obtained if the landowner is entitled to compensation under any other provision.

I now turn, for the purpose of finding the kind of compensation to be given, to the *Railways Clauses Act*. I will only ask your Lordships to bear in mind the words in the 68th section of the Act we are leaving: "If any party shall be entitled to any compensation in respect of any lands which shall have been injuriously affected by the execution of the works." Now, let us turn to the *Railways Clauses Act*, in the *fasciculus* of clauses which I agree commences with these words: "And with respect to the construction of the railway and the works connected therewith, be it enacted as follows." The 6th section is in these words: "In exercising the power given to the company by the special Act to construct the the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act and in the said *Lands Clauses Consolidation Act*" (that is, in the 68th section, among others); "and the company shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company." And then it proceeds to say that that compensation shall be ascertained under the *Lands Clauses Act*. My Lords, I desire, in passing, to point out to your Lordships that the words are evidently to be read *reddendo singula singulis*. If the land be taken or used, full compensation is to be made for the value of the land. If the land be not taken or used, but be injuriously affected by the

construction of the railway, then compensation is to be made for the damage sustained by the owner or occupier, or other party interested, by reason of the exercise, as regards such lands, of the powers by this or the special Act vested in the company.

Then the 16th section I may also refer to—and that will complete the enumeration of the enactments with which we have to deal—it is as follows: "Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith," —that is to say, subject to the provisions and restrictions in the *Lands Clauses Consolidation Act*—"it shall be lawful for the company for the purpose of constructing the railway, or the accommodation works connected therewith hereinafter mentioned, to execute any of the following works." Then follows an enumeration of what I may term structural works, such as turning the course of rivers, making railways across streets, and so on—and then comes this final power: "They may do all other acts necessary for making, maintaining, altering or repairing, and using the railway." Then comes what appears to me to be of great importance—the term and condition upon which alone they are authorized and empowered to make these structural works—and the condition is this, not that in the exercise of these structural powers they are to make certain compensation, but the condition is, "That in the exercise of the powers" (that is, of all the powers) "by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction in manner herein and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers,"—that is, of all the powers vested in the company.

My Lords, I venture to think that it would be too narrow a construction of these words to say that the powers here mentioned are simply those powers which are immediately before enumerated. If that had been the intention of the Legislature nothing could have been easier than to say, and, indeed, it would have been much shorter to say, "Provided always, that in the exercise of such powers they shall make full compensation to the persons interested." Then we should have known exactly that what was intended was, that if by reason of the exercise of those structural powers any damage was done, they should make compensation. But, on the

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contrary, the provision is in substance this: We, the Legislature, will authorize you to make these structural works, but the term and condition upon which we authorize you to make them is, that if by reason of the exercise of any of the powers by this or the present Act given to you, you do any damage, you shall make compensation for that damage. In other words, we will authorize the railway to be made with certain powers appendant and annexed to the making of the railway, one of the main and special ones of which is, that the railway shall be used as a passage for locomotive engines—but if by reason of the exercise of any of the powers we give you, you do damage, you shall make full compensation for that damage to the persons injured.

Now, having taken the liberty of pointing out to your Lordships the sections with which we have to deal, I shall sum up what appears to me to be the true and proper construction, even if we were dealing with the 6th section alone of the *Railways Clauses Act*, of those words which have been referred to already, "injuriously affected by the construction of the railway." Even if we were dealing with that section alone, it would appear to me that those words, "by the construction of the railway," are just the same words, and intended to denote the same idea, as the words in the 68th section of the *Lands Clauses Consolidation Act*, "injuriously affected by the execution of the works" and that even dwelling upon those two sections alone; and not praying in aid at all the 16th section, the position of things would be this:—Parliament authorizes the construction of the railway, but Parliament does not look upon those words "the construction of the railway" or "the execution of the works authorized," as meaning the digging out so much land, the putting so much brick and mortar together, the making a viaduct, or the making an embankment, or the mere structural aspect of the work—it looks upon the railway as an undertaking, as a going concern, if I may so call it, as a thing which is to be there for a certain purpose and to fulfil a certain end which the Legislature has had in its view—and when it uses the terms "the execution of the works" and "the construction of the railway," it appears to me to point to a living and active thing, which, placed in the spot where Parliament authorizes it, may possibly have an injurious effect on some circumjacent land. And

then, pointing to that parliamentary power which is given to construct that railway or to execute that work, Parliament says: "If by the construction of this railway with these incidents, if by the execution of these works, there be a consequence in the shape of damage to those who are in the neighbourhood, that damage must be atoned for by compensation."

This case might be illustrated very easily by putting another case—not the instance of a railway; the *Lands Clauses Consolidation Act* applies to works of all kinds, not merely to a railway. Suppose that under a special Act of Parliament persons were authorized to take land for the purpose of making, in a particular locality, gasworks, or were authorized to make on a particular spot copper smelting works, either of which we know, when they came to be worked, would most probably produce injury to the circumjacent land, although the land around might not be taken by the company. Supposing Parliament authorized the gasworks or the copper smelting works to be constructed, by words of enactment which would make it impossible for the owner of the adjacent land to maintain an action for the injury sustained, and then Parliament said: "If by the execution of these works the neighbouring owners sustain any damage you shall pay for such damage," I should understand by an enactment of that kind, not that the neighbouring owner is supposed to be likely to sustain damage by the construction of the building, by putting the bricks and the mortar together, but to sustain damage by those works as active going works, which were there for the purpose of manufacturing gas or smelting copper, as the case may be; and that when Parliament said: "If by the execution of these works damage is done," Parliament meant to say: "If by the execution of these works, *quâ* gas works or *quâ* copper smelting works, continuing to exist and actively proceeding, any damage is done, that damage shall be paid for."

I may remind your Lordships that this question was very near having to be decided once in your Lordships' House, although, from circumstances, the decision became unnecessary. In the case of *Broadbent* v. *Imperial Gas Company* (1) the case which I have supposed was very near happening. The company was authorized

(1) 7 De G. M. & G. 436, 447–8. See also 7 H. L. C. 600.

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to make a gasworks in a particular place, and the *Lands Clauses Act* was incorporated to a certain extent in the provisions of the special Act, but there was a clause in the *Gas Clauses Act*, also incorporated, which provided that in carrying on their works, and making gas, no nuisance or injury should be occasioned to any of the surrounding land. And it was held by this House, as might be expected, that the consequence of that section being introduced was that the right of action was not taken away, and therefore it was not necessary to consider the case I have suggested. But if you had a case where the right of action was taken away, and where Parliament had provided that compensation should be made for injury done by the execution of the works, then, in my opinion at least, it would mean and imply the execution of the works of the undertaking as an active and going concern. That would be the opinion which I should entertain on the 6th section alone, even without the 16th section.

As it appears to me that Mr. Justice *Lush* has expressed with great felicity the same idea which I have entertained, I cannot do better than remind your Lordships of what Mr. Justice *Lush* says: "The *Lands Clauses Act* is designed not for railways only, but for all undertakings for which compulsory powers of taking lands are given. And every special Act which incorporates its provisions designates and fixes the purpose for which the land is to be taken, and the use to which it is to be permanently appropriated; and the company who are empowered to take it are bound to apply it to that purpose, and to that purpose only. So much of the general Act as is incorporated becomes part of the special Act, and its language, as part of that Act, becomes pointed to the particular work or undertaking specified, whatever it may be, whether a railway, a dock, a canal, or any other undertaking. It there authorizes the taking of the land for the purpose of, and its conversion into, the particular railway, dock, or canal, in order that it may be used as such. The undertaking is regarded as a working concern, and the idea of its use as a railway, dock, or canal is, in the mind of the Legislature, inseparable from that of its construction. In professing to give compensation for all damage sustained by the owners of the adjacent land by the 'execution of the works,' or 'the exercise of the powers of the Act as regards

such lands,' the Legislature must, as it appears to me, have had in view the ultimate object aimed at, the works when complete and in operation—the dock, railway, or canal—not abstractedly as a mere excavation, embankment, or reservoir, but in connexion with its appropriate traffic and with the ordinary incidents of a business undertaking."

It appears to me that if it is necessary to go beyond that, and to make the case still clearer, the case is made clearer by the 16th section; because, as I interpret that section, it seems to me to give a number of powers—structural powers I agree—but to make it the term and condition of exercising those structural powers, of interfering with rivers and with roads, and exercising those others which may be termed violent powers which are given by that Act or by the special Act, that the company shall make full satisfaction to every person for all damage sustained by reason of the exercise of such powers; that is, of all the powers given by the Act to the company.

Now, my Lords, that being certainly the view which I should take of the construction of these Acts of Parliament, the only other matter which I have to refer to is what appears to have weighed in the minds of some of the learned Judges who were unable to adopt this view. I observe that some of those learned persons say that there would be very great difficulty in estimating the compensation because the damage could not be ascertained until the undertaking became, what I may call, a going concern, and until by experience you had ascertained exactly what the amount of damage or injury actually was. Now I do not think there is any difficulty at all on that head. In the first place, in the present case which we have here before us no difficulty seems to have occurred. A sum has been found by the jury, not representing merely the past damage, but representing the whole damage which, in the opinion of the jury, both had been sustained and would be sustained by the exercise of the powers given to the company. In addition to that, the problem which has to be solved appears to me not to be at all beyond the powers or the province of a jury. What you have to find is, what is the actual deterioration in value. You have a certain house, and near it what I may call a vibrating railway—I mean a railway in the use of which there cannot fail to be vibra-

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tion—the house was of a certain value before the railway was put there: if the railway causes vibration, evidence can easily be obtained to prove what the amount of deterioration in value is, and the sum can be awarded accordingly. The subject may be illustrated farther by supposing a house used for a particular trade, say that of a watch or clockmaker, which requires particular steadiness, serious injury might be done there, and the house might become useless for the particular purpose for which it was used before.

But, in addition to that, it is said that you ought to know how many trains a day there will be running, and the weight of them, and the speed at which they will pass. There is a well-known principle which applies to such cases, which is, that if the persons against whom the claim is made are not willing to bind themselves as to the maximum number of trains, or the weight, or the speed, then the sum must be taken most strongly against their company: upon the principles enunciated in the well-known old case of *Armory* v. *Delamirie* (1). And the largest amount of injury which can be sustained would probably be considered to be the amount to be awarded by the tribunal which has to award compensation.

I might mention another case in which every one would admit that compensation would have to be assessed at the commencement, and where the same difficulty might occur. Your Lordships will recollect cases which have come before this House arising upon questions of which *Sprott* v. *The Caledonian Railway Company* (2) may be taken as an instance. In those cases it was held that a landowner selling a strip of land to the railway company is bound to give lateral support to resist the pressure which a heavy train passing over the land might occasion. Now, in that case there must be compensation assessed and payable for the land taken in the first instance. Yet at the time when that compensation is so assessed it might not be known what the number of trains passing along the railway, or the weight or speed of them, would be, and therefore it might not be possible to say with mathematical exactitude what would be the precise amount of support which would have to be given to the land on each side. In such a case the landowner would make his claim; he would shew that the nature

(1) 1 Str. 505. (2) 2 Macq. Sc. Ap. 449.

of the ground was such that lateral support would be particularly desirable; he would shew that he might have to support the land against the pressure that would be created by a great number of trains passing every day, and he would claim, and probably would recover, compensation for the maximum amount of support which the land would require. I therefore cannot accept the suggested difficulty as to ascertaining the amount of compensation as any reason why the Act of Parliament should be taken as having a meaning other than what appears to me to be the plain meaning of the words.

My Lords, I regret very much to say that I am afraid that the result will be, that although clear injury and damage have been sustained, and although a substantial sum has been awarded by a jury to the landowner, that sum will not be recovered. But I have been unable to do otherwise than to express to your Lordships the view which I entertain as to the construction of these statutes in a case which, as it appears to me, may be one of great importance.

Judgment of Exchequer Chamber reversed.

Lords' Journals, 13th July, 1869.

Attorneys for the Plaintiffs in Error: *Elsdale & Bryne.*

Attorneys for the Defendant in Error: *Aldridge, Bromley, & Thorn.*

1868
June 30;
July 2, 3.

1869
April 22;
July 13.

THE DIRECTORS, &c., OF THE GREAT WESTERN RAILWAY COMPANY. . . } PLAINTIFFS IN ERROR;

AND

WILLIAM RICHARD SUTTON . . . . } DEFENDANT IN ERROR.

Railway Charges—Power to impose—Condition—Equality Clauses—Evidence—Money had and received—7 & 8 Vict. c. iii. s. 50.

4 BD. 262. 268

An absolute power in an Act of Parliament to fix charges for railway carriage is not rendered conditional by a subsequent clause requiring that all the charges made shall be made equally on like goods carried under like circumstances for all persons. The condition only attaches after the power has been exercised.

A charge of so much per ton, and 50 per cent. in addition, is a tonnage charge, and therefore precisely within the words of the 50th section of the 7 & 8 Vict. c. iii.

The words "goods of a like description and quantity" and "conveyed along the railway under the like circumstances" in the 7 & 8 Vict. c. iii., and "goods of the same description" and "under the same circumstances," in the *Railways Clauses Act*, are used not with reference to the contents of the parcels, but to the parcels themselves, that is, like or different for the purposes of carriage—and these words are used with reference to the conveyance of goods and not to the persons who send them.

In an action for money had and received to recover back charges alleged to have been improperly made on the Plaintiff, evidence was tendered at the trial, and received, to shew that mercantile houses were in the habit of dispatching to the railway packed parcels, that is, parcels containing numbers of different parcels of different kinds of goods, and sent from and to different persons; that these packed parcels were so packed by these mercantile houses for the accommodation of their own customers and friends, and that these facts were well known in the trade, and (inferentially) to the railway company, but that a lower charge was made for them than for parcels packed in the same manner by the Plaintiff, who was a carrier, and who collected and packed parcels of the same sort in the way of his business. On exception that this evidence was insufficient without affirmatively shewing that, as a fact, the Defendants knew that these mercantile houses did so pack the parcels, and, so knowing, made a difference in the charge, it was held in the Court below and affirmed in this House, that the evidence was admissible, and warranted the Judge in telling the jurors that "there was evidence that parcels were carried by the Defendants for other persons containing goods of a like description, and under like circumstances, at a rate less than such goods were carried by them for the Plaintiffs."

The agent and the traffic manager of the Defendants had been present as parties at a reference where facts of this sort were proved in their hearing:—

Held, that evidence of their having been so present was properly admis-

sible as part of the proof that the Defendants were informed and knew of the habits and practices of the mercantile houses, and knowingly charged the Plaintiff a higher rate than was demanded of other persons for the carriage of like packed parcels of goods carried under the like circumstances.

Money paid in excess under the above circumstances can be recovered back in an action for money had and received.

THIS was a proceeding in Error upon a judgment in the Exchequer Chamber which had affirmed a judgment in the Court of Exchequer.

The Plaintiff *Sutton* had brought money had and received against the Defendants to recover from them the amount of certain alleged over-charges. The Defendants pleaded except as to £50 never indebted—and as to that sum, payment into Court. The Plaintiff took issue on the plea of never indebted, and took the £50 out of Court. The cause was tried in *London* before Mr. Baron *Martin* and a special jury on the 4th of July, 1864, when, under the direction of the learned Baron, a verdict was found for the Plaintiff. This verdict was, upon a bill of exceptions, affirmed in the Exchequer Chamber, *diss.* Lord Chief Justice *Erle* (1).

The facts of the case were in substance these:—The Plaintiff was a carrier in *Aldersgate Street*, *London*, but had also places of business and agents at *Bath*, *Gloucester*, *Bristol*, and other places in the West of *England*. His business was that of collecting parcels from wholesale houses and from private individuals, packing them together in boxes or hampers, which he addressed to his country agents, and sending them by the *Great Western Railway* to the different towns where he had agents, who there received the boxes or hampers, and distributed the parcels. His agents in like manner collected and forwarded to him similar boxes or hampers of parcels so collected, and on their arrival in *London* he received them from the Defendants and distributed them to the ultimate consignees. The profits of the Plaintiff were derived from charging each parcel as if it had been separately carried by the Defendants along their line and delivered by himself in town. He complained that the Defendants had charged him at a higher rate than was lawful for carrying these packed parcels, for that they were bound by the 7 & 8 Vict. c. iii., s. 50, and 8 & 9 Vict. c. 20, s. 90, to charge all persons

(1) 3 H. & C. 800.

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sending parcels of the like description and under the like circumstances at the same rate; but that the Defendants carried packed parcels of the like description and under the like circumstances for various wholesale *London* houses, and charged them at a lower rate. The Defendants contended they had a right to charge as they had done, under the Act 10 & 11 Vict. c. ccxxvi., which they insisted was the Act that regulated their traffic (1). On the other hand, the Plaintiff insisted that what was known as the equality clause in the 7 & 8 Vict. c. iii., s. 50 (2), prevented the Defendants from charging him differently from any other person under like circumstances.

At the trial of the cause the Plaintiff called evidence to shew the nature of his business as already described, and he also put in evidence a tariff of the Defendants' charges, which was in the following form:—

"RATES FROM LONDON

"On Goods and Parcels above 1 cwt. and under 500 lbs. by Luggage Trains.

	1st	2nd	3rd	4th	5th	Class Packed Parcels.
Bath	21/8*d.*	26/8*d.*	32/6*d.*	37/6*d.*	42/6*d.*	42/6*d.* and 50 per cent.
Bristol	22/6	27/6	35/	40/	45/	45/ and 50 per cent.
Exeter	30/	35/	40/	50/	70/	70/ and 50 per cent.
Swansea	33/4	36/8	46/8	51/8	86/8	86/8*d.* and 50 per cent."

(1) The section in question is in these words: "And with respect to *small packages*, and single articles of great weight, be it enacted, that, notwithstanding the rate of tolls prescribed by this Act, the company may lawfully demand the tolls following (that is to say), for the carriage of small parcels (that is to say), parcels not exceeding 500 lbs. weight each, the company may demand any sum which they think fit: Provided always, that articles sent in large aggregate quantities, although made up of several parcels, such as bags of sugar, coffee, meal, and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages."

(2) That section gave the Defendants power to charge such sum (not exceeding the sum limited by certain special Acts) "per ton, or per mile, or by bulk, number, measure, or admeasurement, or by fixed charges, as they should think expedient: Provided always, that in whatever way the charges are made they shall be made equally to all passengers and to all persons in respect of all animals and of all goods, wares, merchandise, articles, matters, and things of a like description and quantity, and conveyed in or propelled by a like

"RATES FROM LONDON
"On Goods and Parcels under 1 cwt.

	28	56	112
Bath	1/	1/	1/8*d.*
Bristol	..	1/3*d.*	2/6*d.*
Exeter	..	1/	1/3*d.*
Swansea	1/6*d.*	2/	2/6*d.*

Packed Parcels, the above, and 50 per cent."

The Plaintiff on the 26th of December, 1861, sent to the Defendants' railway a hamper containing parcels packed together, and which hamper weighed 4 cwt. 2 qrs. 19 lbs. It was to be carried from *London* to *Bath*, and the charge made by the Defendants in respect of the carriage was at the rate stated in the above tariff for "packed parcels," namely, at the rate of 42*s.* 6*d.* per ton, and 50 per cent. in addition. Whenever the Plaintiff sent a packed parcel it was always so declared in the ticket he sent with it.

The Plaintiff called several witnesses, who proved that they were in the service of large wholesale firms in *London*, that they packed hampers made up of parcels of different sorts of goods, and of different sizes, and sent them to the Defendants' railway, by which these packed hampers were forwarded to the country, and there distributed; that these different firms sent in one package parcels to various consignees in their own business, and also parcels from other tradesmen in *London* for the same consignee, and occasionally for more than one consignee in the same town. But these firms were not paid for so sending parcels, but were accommodated in the same way by other firms. And it was proved that the Defendants' charges to these firms for carriage were the same, whether there were enclosures in the package or not, and it was admitted that it was impossible to tell from the outside of the package whether it contained packed parcels or not, but that they were always declared as drapery goods, and no other question was

carriage or engine, passing only over the same portion of and over the same distance along the said railways, and under the like circumstances, and no reduction or advance in any of the said charges shall be made partially, either directly or indirectly, in favour of or against any particular company or person."

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asked about them. The charge was always at the 4th class rate of the tariff, which was the rate appropriated to drapery goods, and these firms were never charged the extra rate of 50 per cent. as upon packed parcels. The Defendants' counsel objected to the reception of this evidence, but the objection was overruled: they then objected that it furnished no proof that the Defendants knew what was the practice of these firms, or had any means of knowing it; and that therefore there was no proof of the Defendants having charged these persons and the Plaintiff in an unequal manner. The learned Baron, however, left it to the jurors on this evidence to say whether, in fact, the Defendants had made unequal charges on their customers, and if so, whether they had done it knowingly; and he directed the jurors that if they found these facts affirmatively their verdict must be for the Plaintiff. The Defendants' counsel excepted to the admissibility of this evidence, and to the direction to the jury. Subject to these exceptions the jury returned a verdict for the Plaintiff. On the argument of the bill of exceptions in the Exchequer Chamber, before Lord Chief Justice *Cockburn*, Lord Chief Justice *Erle*, and Justices *Byles*, *Willes*, *Blackburn*, *Keating*, *Mellor*, and *Shee*, judgment was given or the Plaintiff (*diss.* Lord Chief Justice *Erle*) (1), and the case was then brought on Error to this House.

The Judges were summoned, and Mr. Justice *Willes*, Mr. Baron *Bramwell*, Mr. Justice *Blackburn*, Mr. Justice *Keating*, Mr. Baron *Pigott*, and Mr. Justice *Lush* attended.

The *Attorney-General* (Sir *J. B. Karslake*), and Mr. *Field*, Q.C. (Mr. *Raymond*, and Mr. *F. M. White*, were with them), for the Plaintiffs in Error, Defendants in the Court below:—

The power of the Defendants to make the charges now com-

(1) His Lordship said: "The charge of 50 per cent. extra for packing is a *parcel charge* lawful under s. 53 of the 10 & 11 Vict. c. ccxxvi., authorizing charges for parcels at discretion, and is not within the operation of the 7 & 8 Vict. c. iii. s. 50, requiring equality of charge under certain conditions in respect of the charges authorized by that section, and therefore is not rendered unlawful by reason of the alleged inequality." He was also of opinion that there was no evidence on the points mentioned in the exceptions, that inadmissible evidence had been received, and that "no action lies to recover back part of a charge for carriage, lawful in itself, by reason that the same service of carriage has been done for some other person at a lower charge."

plained of is given by the 10 & 11 Vict. c. ccxxvi. s. 53. The parcel, in respect of the charge on which this action was brought, was a small parcel within the terms of that section, and the Defendants were empowered to charge for its carriage what they thought fit. There is nothing to incorporate the provisions of this section with those of sect. 50 of the 7 & 8 Vict. c. iii. It is contended for the Plaintiff that there has been such an incorporation, and that by referring to the various Acts passed on the same subject at an earlier and at a later date, the Legislature did not intend to leave with the railway company this discretionary power of charging for the delivery of parcels, but did intend to fetter it with the condition that there should be a rate charging equal on all. In support of that argument the 5 & 6 Will. 4, c. cvii. s. 175, was referred to. But that section did not embrace a case of this kind. It enacted that the rates should be charged equally, and after the same rate per ton per mile in respect of the same description of articles; and that no charge should be made in favour of or against any particular individual or company, or confined to any particular part of the railway. In the first place, that section in itself does not justify the contention of the Plaintiff; in the next, it has been repealed, and the 50th section of the 7 & 8 Vict. c. iii. substituted for it. Now this latter section enables the Defendants, whether acting as carriers, or providing locomotive powers for others who are acting as carriers, to charge per ton or per mile, or by bulk, measure, number, or admeasurement, or by fixed charges, at their pleasure: "Provided that the charges shall be made equally and to all passengers in respect of all animals, goods, &c., and things of a like description, &c., and no reduction or advance in any of such charges shall be made partially, either directly or indirectly, in favour of or against any particular company or person." There is nothing in this section which, taken together with the 53rd section of the 10 & 11 Vict. c. ccxxvi., can be said to control the provisions found in the 53rd section of the later statute:—[THE LORD CHANCELLOR (Lord *Cairns*):—Suppose it to be proved that you took from some other person parcels packed by him and charged him the carriage rate in your tariff, without the 50 per cent., but charged, for the same sort of parcels sent by the Plaintiff, that additional 50 per cent., could you justify that

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under your Acts?] In order to bring the Defendants within the terms of the equality clause, it is necessary to shew that they knowingly charged *A. B.* at one rate for a particular sort of parcels, and knowingly charged *C. D.* for exactly the same sort of parcels another rate. But there has been no such proof given in this case. Evidence that certain mercantile houses sent packages consisting of many different parcels packed together did not furnish that proof, for there was no evidence that the Defendants knew or even could know what were the contents of these packages. That being so, no charge of inequality arises. But if any such proof had been given, the remedy would not have been by action for money had and received, but by a proceeding under the *Railway Traffic Act* (17 & 18 Vict. c. 31). The present case amounts to this, that some persons being carriers, and intercepting carriers, sent, for their own profit, packed parcels by the railway, that they might be distributed in certain towns, and these persons complained that they were, knowingly, charged more than other persons who, having no view to their own profit, sent parcels packed in the same way. But there is no proof that the Defendants knew that any other persons followed the same practices; and the Defendants knowing that the Plaintiff did so, had a right under the 53rd section to charge him accordingly. For the Plaintiff to make out that the Defendants are wrong, he must shew that they established a certain tariff for the carriage of certain goods; that they knew how certain persons carried goods so as to be liable to the highest amount settled in the tariff, yet that they exempted those persons from the highest charge, but charged it upon him.

Even that, however, would not be sufficient to justify him in making this claim. If all the customers of the Defendants, except one, were charged at a certain rate, but the Defendants chose to make an exception in favour of that one, no right of action would thereby arise to all the rest. The Legislature never could have intended that, under no circumstances whatever, should a company remit a part or the whole of its charges in favour of one individual, without giving to every one else a right of action against it. The Defendants had a right if they chose to carry certain persons on a certain journey for nothing, but that could not be taken to compel them to carry everybody else on the same journey without charge, or sub-

ject them to an action if they did not. Here, however, the Defendants were under no necessity to maintain that argument, for there was no evidence whatever that they knew of other persons besides the Plaintiff sending these packed parcels. The utmost to which the evidence reached was, that other persons had done so, not that the Defendants knew of that fact, and, consequently, the direction of the learned Baron, that the jurors were to consider "whether the Defendants had knowingly and purposely charged the Plaintiff at a higher rate upon a packed parcel of goods," was a misdirection. There was no evidence which warranted such a mode of leaving the case to the jury; but even if there had been, there still would have remained the argument, that unless there was actual proof of wilful misfeasance the Defendants had a right, upon considerations on which they alone were competent judges, to allow some one individual a special advantage. They might by doing so obtain a benefit to the company which no other individual customer could secure them. No one could pretend that under such circumstances they must forego all hope of obtaining the advantage because they were prevented from offering an equivalent for it. *Primâ facie* the directors of a railway company are entitled, and bound, to get as much revenue as they can for their shareholders. They find one who, for his own profit, does all he can to prevent this. Surely they have a right to favour another man who does not so interfere with their means of prosperity. Suppose they were entitled to a large debt from one man, might they not, from considerations of their own, remit the whole or a part of that debt without subjecting themselves to be called on by several other persons to remit the debts which those other persons owed them. Or suppose the company carried goods for one particular person for nothing, could all other persons on that ground recover back all they had been required to pay for the carriage of their goods. The provision about equality was never intended to apply to such matters as these.

Money had and received will not lie in this case. Lord Chief Justice *Erle* put the case unanswerably when he said, "No action lies to recover back part of a charge for carriage, lawful in itself, by reason that the same service of carriage has been done for some other person at a lower charge." *Baxendale* v. *The Great Western*

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Railway Company (1) was the case relied on in the Court below, but even assuming that decision to be unimpeachable, it was distinguishable from the present, for the money recovered back there was money which the Plaintiff had been compelled to pay as for work done, when in fact the company had not done the work at all. And when the same question came directly before the Court in *Garton* v. *The Bristol and Exeter Railway Company* (2), it was distinctly held that the Plaintiff was not entitled in an action for money had and received to recover from the company the excess of the sums paid by him above those paid by other parties.

Mr. *J. Brown*, Q.C., and Mr. *Marshall Griffiths*, for the Defendant in Error, Plaintiff below:—

There is no analogy for the purposes of a case like this between a common carrier and a railway company. The privileges granted by the Legislature to the latter are accompanied by certain obligations which do not affect the former. There is no doubt that the Defendants may, within certain limits, fix for the carriage of goods what charges they deem fit; but they are bound so to exercise that power that they shall not make one man pay more than another for precisely the same services. The equality clauses in the 7 & 8 Vict. c. iii., and the 10 & 11 Vict. c. ccxxvi., are all applicable to this case, and, though somewhat differently expressed, have all the same purpose in view. The principle which the Legislature had in view was stated in *Barrett* v. *The Stockton and Darlington Railway Company* (3), namely, that a new charge could not be imposed without the express authority of the Legislature, and a bill to restrain overcharges was held maintainable. There is no such authority here for the charge of the additional 50 per cent.

There is evidence that the goods carried for the Plaintiff were, in the words of the different Acts, goods of a like description, and carried under like circumstances, and that the Defendants were shewn to be aware of the fact. The parcels were externally alike, the descriptions given of them were alike, the Defendants themselves insisted that they could not examine into the contents of each package sent by the mercantile firms, and, consequently,

(1) 14 C. B. (N.S.) 1. (2) 1 B. & S. 112.
(3) 1 H. L. C. 18.

when packages of packed parcels were sent by the Plaintiff, they must be treated as parcels of the like description as those bearing the same external character sent by the private firms. And when to this was added the proof that the practice of mercantile houses sending these packages of packed parcels was perfectly known to all the trade, and to the railway companies, and, through their agent and traffic manager, to the Defendants themselves, it was clear that all the circumstances were established which brought the Defendants within the provisions of the equality clauses. *Pickford* v. *The Grand Junction Railway Company* (1), *Parker* v. *The Great Western Railway Company* (2), *Parker* v. *The Great Western Railway Company* (3), *Edwards* v. *The Great Western Railway Company* (4), and *Piddington* v. *The South Eastern Railway Company* (5), all shew that these overcharges cannot be lawfully made, and that money had and received is a proper form of action in which to recover them back. The latter point appeared to be doubted in *Garton* v. *The Bristol and Exeter Railway Company* (6), but that was overruled in *Baxendale* v. *The Great Western Railway Company* (7). In all it was declared that the fact of the Plaintiff not being the ultimate consignee of the goods made no difference in the matter. This latter point was farther declared in *Crouch* v. *The Great Northern Railway Company* (8), and again in *Crouch* v. *The Great Northern Railway Company* (9).

Garton v. *The Bristol and Exeter Railway Company* (10) is decisive on the point of packed parcels. There the fullest description of these packed parcels was given, and it appeared that the packed parcels there contained cases of spirits, as to which extra risk was incurred, but because a carrier was charged 50 per cent. in addition to the ordinary charge for such parcels demanded from other persons who sent them, the charge was held to be unequal and unreasonable. That case was carried to the Exchequer Chamber (11), and afterwards brought up to this House (12), but only upon another point; the decision was never questioned upon that.

(1) 10 M. & W. 399.
(2) 7 Man. & G. 203.
(3) 11 C. B. 545.
(4) Ibid. 588.
(5) 5 C. B. (N.S.) 111.
(6) 1 B. & S. 112.
(7) 16 C. B. (N.S.) 137.
(8) 9 Ex. 556.
(9) 11 Ex. 742.
(10) 4 H. & N. 33.
(11) Ibid. 831.
(12) 8 H. L. C. 477.

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Branley v. *The South Eastern Railway Company* (1) is no authority the other way, for there the Act which created the company a steam packet company, though it contained an equality clause as to passengers, contained none as to goods. The burden of shewing a charge to be reasonable, and, *à fortiori*, of shewing that it is warranted by the equality clauses, lies on the company which imposes it: *Peek* v. *The North Staffordshire Railway Company* (2).

The evidence here was sufficient, and was properly left to the jury. It would be absurd to contend that the Defendants could be ignorant of facts which had long been of daily occurrence, and were, in fact, known to their own traffic managers and agents, as well as to the mercantile world in general.

Mr. *Field* replied.

The LORD CHANCELLOR (Lord *Cairns*) proposed the following question to the Judges:—

Ought judgment on this record to have been given in the Exchequer Chamber for the Defendant in Error? Or,

Ought a *venire de novo* to have been awarded?

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April 22. MR. JUSTICE BLACKBURN:—

I answer your Lordships' question by stating, that in my opinion the judgment in the Exchequer Chamber was right.

The points in this case are raised by exceptions to the reception of the evidence received by the Judge on the trial, and to his direction to the jury as to what were the inferences which might be properly drawn from that evidence, and as to the legal consequences which would follow from the inferences if drawn by them. It is therefore necessary to consider the general question as to the rights of persons who, like the Plaintiff, carry on the trade of carriers on railways, and of the railway companies, and also the effect of the evidence given in this particular case.

I think it will be more convenient to consider what are the rights of individuals carrying on the Plaintiff's trade as against railway companies, which is a question of general importance, before inquiring into the validity of those exceptions which only

(1) 12 C. B. (N.S.) 63. (2) 10 H. L. C. 473.

affect this particular case, though those also must ultimately be determined.

At common law a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a *reasonable* compensation for so doing; and if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform his duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received as being money extorted from him.

But the fact that the carrier charged others less, though it was evidence to shew that the charge was unreasonable, was no more than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favoured individuals at an unreasonably low rate, or even gratis. All that the law required was, that he should not charge any more than was reasonable: see *per Byles*, J., in *Baxendale* v. *Eastern Counties Railway Company* (1), and *per Willes*, J., in *Branley* v. *South Eastern Railway Company* (2). But when railways came into operation, and it was found that they practically superseded all other modes of transit, it became a question for the Legislature how far they would, when granting numerous persons power to make a railway and act as carriers on that line, impose on them restrictions beyond what the common law imposed on ordinary carriers.

At first the Legislature in each special Act inserted such clauses as seemed, to the particular committees, reasonable in each case. Very soon those came to be usual clauses which the then Chairman of Committees of the House of Lords used to require to be inserted in all railway bills with more or less modification. They were known by his name as "Lord *Shaftesbury's* clauses." Finally, in 1845, the Legislature embodied in a general Act (8 & 9 Vict. c. 20) those clauses which it was thought expedient should generally be inserted in railway Acts.

(1) 4 C. B. (N.S.) 78.

(2) 12 C. B. (N.S.) 74.

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The Act governing the present case is a special Act of the *Great Western Railway* (10 & 11 Vict. c. ccxxvi.) By the 1st section of that Act the provisions of the company's previous special Acts (including 7 & 8 Vict. c. iii., which had been passed before the general *Railways Clauses Act*, 1845) are to have the same effect as if they had been repeated and re-enacted in it; and by the second clause the *Railways Clauses Consolidation Act*, 1845, is incorporated with it. In the 7 & 8 Vict. c. iii. was contained an equality clause (one of Lord *Shaftesbury's* clauses), sect. 50. And in the *Railways Clauses Consolidation Act*, 1845, is also contained an equality clause, 8 & 9 Vict. c. 20, s. 90. And it is on the effect of those two sections, taken in conjunction with the 53rd section of the 10 & 11 Vict. c. ccxxvi., that the rights of the parties in the present case depend.

The words of the two sections thus incorporated in the 10 & 11 Vict. c. ccxxvi. are not identical, but I think there is no difference in their meaning.

The effect of the 53rd section of the 10 & 11 Vict. c. ccxxvi. is, I think, so far as relates to parcels not exceeding 500 lbs. weight, to take away any limitation as to rates imposed by the special Acts, and to leave the company free to charge what it thinks fit for such parcels, subject, however, to the effect of the proviso for equality contained in the 90th section of the *Railways Clauses Consolidation Act*, 1845, and the similar proviso for equality contained in the former special Act of this company, 7 & 8 Vict. c. iii. s. 50.

Then comes the question, what is the legal effect of this proviso for equality?

I think it appears from the preamble of the 90th section of the *Railways Clauses Consolidation Act*, 1845, that the Legislature was of opinion that the changed state of things arising from the general use of railways made it expedient to impose an obligation on railway companies acting as carriers beyond what is imposed on a carrier at common law. And if this be borne in mind, I think the construction of the proviso for equality is clear, and is, that the Defendants may, subject to the limitations in their special Acts, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances. And I think it follows from this that if the Defendants

do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute, extortionate. And I think that the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies acting as carriers on their line must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the Common Law on ordinary carriers as being more than was reasonable.

The mode of establishing that the demand is extortionate differs in the two cases. Where it is sought to prove that the charge is unreasonable, and therefore extortionate, the fact that another was charged less is only material as evidence for the jury tending to prove that the reasonable charge was the smaller one. When it is sought to shew that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not, it is enough to shew that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances. One single act of charging a person less on one particular occasion would not, I think, make the higher charge to all others extortionate during all that day, or week, or month, or whatever the period might be. I think it would be necessary to shew that there was a practice of carrying for some person or class of persons at the lower rate. But a single instance would be evidence to prove this practice; and if followed up by shewing that the smaller charge was repeatedly made at intervals over a period of time, the jurors would, in the absence of explanation, be justified in drawing, and would probably draw, the inference that the company during the period carried for others at that lower rate, and consequently that the higher charge was extortionate as being beyond the statutable limit of equality. It would be the very essence of the case to prove that the goods were "of the like description and carried under the like circumstances." But I think that this applies to the description of the *goods* and the circumstances of the *carriage*, and not to the trade of the consignor or consignee. The consignor in the present case was what has been called an "intercepting carrier," competing with the Defendants in one of the most lucrative branches of their

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traffic. They would have an intelligible motive for wishing to clog his trade, and I do not see that there would be anything immoral or improper in their doing so by any legal means. But I think that the preamble to the 90th section of the *Railways Clauses Consolidation Act*, 1845, shews that the Legislature thought it inexpedient that railway companies should use their powers for such a purpose, and that the intention in passing the equality proviso was to prevent their treating such a person worse than others.

The weight of authority is, I think, very much in favour of the view I have above expressed.

The first case on the subject was that of *Parker* v. *The Great Western Railway Company* (1), decided the 12th of February, 1844. In that case the Court of Common Pleas, consisting of *Tindal*, C.J., *Coltman*, *Maule*, and *Cresswell*, JJ., had to construe a variety of enactments in the special Acts of *The Great Western Railway Company* then in force, amongst others the 2 Vict. c. xxvii., s. 24, which was one of Lord *Shaftesbury's* equality clauses. And in their judgment (2) they say, "From these several enactments it appears clearly to have been the intention of the Legislature that the parties incorporated should be empowered to construct the railway and hold it as their property and derive certain profits from it, but that every member of the community should have an equal right to use it on the terms prescribed by the Act, and that the payment to be made for such uses, whether under the denomination of rates or tolls, or charges fixed by the company, should be reasonable and equal to all persons without reference to the particular advantage to be derived by any individual or class of individuals from such uses." And they proceed to hold that where a higher charge was paid in order to induce the Defendants to perform that service which, according to that construction of the statutes, they were bound to perform for the smaller charge, the payment was not to be considered voluntary, and the excess might be recovered back under a count for money had and received.

I think it material to call your Lordships' attention to the date of this judgment, the 12th of February, 1844, as the promoters of the 7 & 8 Vict. c. iii., a *Great Western* Act, must have been well aware of it, and the Legislature, when framing the *Railways Clauses*

(1) 7 M. & G. 253. (2) Ibid. 288.

Consolidation Act, 1845, could not fail to have a knowledge of it. I think that the Legislature must be taken to have known what effect the Court of Common Pleas had given to one of Lord *Shaftesbury's* equality clauses. This, I think, bears strongly on the construction of 7 & 8 Vict. c. iii., s. 50, a *Great Western* Act; and I also think that when framing a general code for all Railway Acts the Legislature would not have used similar language unless it was intended to have the same effect. And consequently I think it a fair inference that the intention of the Legislature, when passing the *Railways Clauses Consolidation Act*, 1845, s. 90, was that all future railway companies should be subject to this restriction which the Court of Common Pleas had decided was imposed upon the *Great Western Railway*.

The next cases on the subject were in 1851: *Parker* v. *The Great Western Railway Company* (1) and *Edwards* (assignee of *Parker*) v. *The Great Western Railway Company* (2). These actions were by the same Plaintiff, but for new causes of action, and under a new enactment, the 7 & 8 Vict. c. iii., s. 50, having now come into operation. They were brought in the same Court but not before the same Judges, who now were *Jervis*, C.J., *Maule*, *Williams*, and *Talfourd*, JJ.

In delivering judgment in *Edwards* v. *The Great Western Railway Company*, *Jervis*, C.J. (3), after reading the words of 7 & 8 Vict. c. iii., s. 50, proceeds: "The arbitrator finds that the only 'difference of circumstances' here arises from the fact of *Parker* being a carrier, and that if the same goods under the same circumstances in other respects had been tendered to the company they would have carried them for a less sum. The question, therefore, is this: Is the fact of *Parker* being a carrier a *different circumstance?* or are the goods carried under *different circumstances* when they are carried for anybody else? Now, looking at the words of the 50th section of the 7 & 8 Vict. c. iii., I cannot say that they are." And both in *Parker* v. *The Great Western Railway Company* (4) and in *Edwards* v. *The Great Western Railway Company* (2) the Plaintiff recovered the overcharge under a count for money had and received.

(1) 11 C. B. 545.
(2) Ibid. 588.
(3) 11 C. B. 647.
(4) Ibid. 545.

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In *Crouch* v. *The Great Northern Railway Company* (1), in 1854, before the Exchequer, no question arose as to whether an action for money had and received would lie, the action being for refusing to carry for the Plaintiff (a carrier) on the same terms as for the public. This depended upon the construction of the 90th section of the *Railways Clauses Consolidation Act*, 1845. *Parke*, B., said: "The 90th section of the 8 & 9 Vict. c. 20, is not distinguishable from the 50th section of 7 & 8 Vict. c. iii. The company are bound to charge all persons conveying goods under like circumstances equally. They are at liberty to increase their charges according to the increase of the risk and liability incurred; but they cannot make any difference between individuals. The Court of Common Pleas have already decided the point, and we are bound by their decision." In a second action by the same Plaintiff in 1856, *Crouch* v. *The Great Northern Railway Company* (2), the opinion of the jury was taken whether, as a question of fact, there was any difference in the circumstances between a packed parcel of a carrier containing enclosures for different persons, and a packed parcel containing several enclosures not belonging to a carrier. The jury found there was none; and the Court of Exchequer held that the question was rightly left to the jury, and that the verdict was right. *Martin*, B., gives what seem to me very satisfactory reasons for this decision.

In *Piddington* v. *The South Eastern Railway Company* (3), in 1858, the jury found that there was no additional risk or expense incurred by the company from the packing of parcels. The Court of Common Pleas, consisting on this occasion of *Williams*, *Willes*, and *Byles*, JJ., decided that a charge of double for packed parcels was in violation of the equality clause, and the Plaintiff recovered the overcharge under a count for money had and received.

Up to this date, as your Lordships will observe, the opinions of all the numerous Judges, who considered the questions of this sort, agreed.

In *Garton* v. *The Bristol and Exeter Railway Company*, in 1861 (4), the Plaintiff sought, amongst other things, to recover the difference

(1) 9 Ex. 556.
(2) 11 Ex. 742.
(3) 5 C. B. (N.S.) 111.
(4) 1 B. & S. 112. (See also *Parker* v. *The Great Western Railway Company*, 6 El. & Bl. 77.)

between what was charged to him for the carriage of goods and what was charged to other persons for the carriage of similar goods. The Court of Queen's Bench seem to have decided that an action for money had and received would not lie to recover back the unequal charge, unless it was also unreasonable. I was a member of the Court which decided that case, but I have no recollection of it, nor can I now state how I came to that conclusion. If we thought that the circumstances were not the same, so that the statutable provision as to equality did not apply, the decision and the reasons assigned for it were, I think, quite right. If, as rather appears from the report to be the case, the decision went so far as to say that an action for money had and received would not lie where the overcharge was in breach of the statutable obligation to charge equally, as much as if it had been in breach of the Common Law obligation to charge reasonably, I think the decision was a mistake; and it was overruled in *Baxendale* v. *The Great Western Railway Company* (1), by the Court of Exchequer Chamber, which comprised three out of the four Judges who took part in deciding *Garton* v. *The Bristol and Exeter Railway Company* in the Queen's Bench.

In *Branley* v. *South Eastern Railway Company* (2), in 1862, the first difference of opinion arose. The claim there was to recover back the excess of charges made in *France* for the carriage of goods from *France* to *London*. The whole Court of Common Pleas held that the statutable obligation as to equality of charges was confined to the railway in *England*, and that the common law obligation on a carrier did not require him to charge equally if he charged reasonably. But *Erle*, C.J., speaking for himself exclusively, questioned all the former decisions.

In *Baxendale* v. *The Great Western Railway Company* (3), in 1863, the same learned Judge gave a very elaborate judgment in favour of the Defendants on every point. The majority of the Court of Common Pleas gave judgment for the Plaintiff, resting that judgment solely on the decisions of Courts of co-ordinate jurisdiction expressly in point. This was a perfectly sufficient ground for the decision in the Common Pleas; it ceased to be so when the case

(1) 16 C. B. (N.S.) 137. (2) 12 C. B. (N.S.) 63.
(3) 14 C. B. (N.S.) 1.

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was taken by appeal to the Court of Exchequer Chamber. There, however (1), the former decisions were affirmed.

In the case now at your Lordships' Bar the same learned Judge again delivered a dissenting judgment. As far as regards the main question the majority of the Court of Exchequer Chamber acted on the authority of *Baxendale* v. *The Great Western Railway Company* (2). There is not any decision in your Lordships' House on the question, and the reasons urged by *Erle*, C.J., must be weighed and considered by your Lordships, as in this House the case can no longer be treated as concluded by authority. It is scarcely necessary to say that I treat the views of *Erle*, C.J., with great respect, but I cannot but feel that they are based upon an assumption that the railway companies have a moral right to the monopoly of traffic on the lines which they have constructed, and that the Legislature could not intend to deprive the railway companies of the power to throw obstacles in the way of other carriers interfering with this monopoly. I do not think it falls within my province as a Judge to inquire whether the Legislature has been politic or not; but for the reasons already given I think it clear that the Legislature did intend this very thing.

I now proceed to discuss the particular exceptions in this case.

Three of the exceptions are directed to the reception of particular evidence. As to those I have nothing to add to what was said in the judgment of the majority of the Court in the Exchequer Chamber. I think the evidence was all admissible for the reasons there given.

Then comes the exception to the direction of the Judge that there was evidence on which the jury might find "that parcels had been carried by the Defendants for other persons containing goods of a like description and under like circumstances at a less rate than such goods were carried by them for the Plaintiff." The objection to this is, as I understand it, twofold:—First, it is said there was no evidence that the goods were of *a like* description, inasmuch as the Plaintiff's parcels contained enclosures of a miscellaneous character, as might be expected in the case of a carrier, whilst the packed parcels of the wholesale houses probably consisted of en-

(1) 16 C. B. (N.S.) 137.

(2) 14 C. B. (N.S.) 1; 16 C. B. (N.S.) 137.

closures of a less miscellaneous nature; and at all events were not shewn in any case to be identical in their contents with any one packed parcel of the Plaintiff; but I think that on looking at the tariff of the company set out in the bill of exceptions it is obvious that the description of goods on which the Defendants imposed the higher charge was a parcel containing packages of whatever kind, whether miscellaneous or homogeneous; and that if the Plaintiff had brought a parcel containing packages exclusively consisting of drapery goods, so as to be identical with one of those sent by Messrs. *Morley*, he would have been charged the higher price. The Defendants are authorized to charge what they please for packages under 500 lbs. weight; and may make the charge according to any description they like. They choose to say, "We will charge the same for a package containing five enclosures and weighing 400 lbs. as for one containing ten enclosures and weighing 450 lbs.," and they may do so; but whilst they charge by that description they must charge all goods coming under that description equally to all. In the present case, they have made the description that of packed parcels, and it is the same whatever be the nature of the packages, or their number, or their weight; at all events, the jury might well find so, which is the only question on the record.

The next objection is, that the circumstances are not the same. I do not think it can be said as a matter of law that they are the same, but I think the jury might, on this evidence, properly draw the conclusion that they were. I have already intimated to your Lordships my opinion that the circumstances must be those relating to the carriage, not to the consignor, and that the fact that the Plaintiff was a rival carrier does not, in itself, make a difference in the circumstances such as to justify a difference in the charge under the statute; it rather makes against the Defendants as supplying a motive for an attempt to evade the statutable provision: but I think there were matters in favour of the Defendants which the jury had to consider. Seeing that the Plaintiff from the nature of his trade brought all his parcels packed, whilst the wholesale houses brought only about 10 per cent. of theirs packed, it was for the jury to consider whether the failure on the part of the Defendants to charge the wholesale houses for their packed parcels was owing to the difficulty of detecting and charging for them or not. I think

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it the circumstances of the wholesale houses sending nine unpacked parcels along with a packed one, made it so difficult to detect and charge for it, as to make it impracticable so to do, that would be a difference in the circumstances, and I do not by any means say that a verdict for the Defendants on that ground would have been wrong; but then it is to be remembered that the Defendants had the exclusive means of proving what attempts they had made to try to enforce their tariff against the wholesale houses, and how far they had found it impracticable so to do, and I think the jury might fairly think that there was quite enough proved to call upon the Defendants for an answer. I think, therefore, that the Judge would not have been justified in directing a verdict for the Defendants on this ground.

The last exception raises the general question whether the Judge was right in directing the jury that "if they believed that the Defendants knowingly charged the Plaintiff at a higher rate than other persons upon a packed parcel of goods they ought to find a verdict for the Plaintiff on the issue aforesaid." I still entertain the opinion expressed in the Exchequer Chamber that it is not open on this exception to raise any question as to the form of the pleadings which might have been cured by an amendment. And if, therefore, an action for money had and received would not lie, but some other action would, the exception could not prevail. But it seems to me that the Plaintiff's cause of action, if stated at length, would be this: "The Defendants being bound by the statute to carry for the Plaintiff at a rate not exceeding what they charged to others, for goods of the like description under the like circumstances, refused so to do unless the Plaintiff paid them a larger sum, which the Plaintiff under protest was compelled to pay in order to procure them to perform their duty, whereby an action had accrued to him to recover back the excess thus extorted from him." This is merely an expanded count for money had and received. The question, therefore, on this part of the exception seems to me to be whether the statute has this effect, on which I have already expressed my views at length.

For these reasons, as already said, I answer your Lordships' question in favour of the Plaintiff below.

In this opinion my Brothers *Keating*, *Pigott*, and *Lush*, concur.

MR. JUSTICE WILLES:—

My Lords, I agree with my Brothers *Blackburn, Keating, Pigott,* and *Lush,* in opinion that judgment ought to have been given in the Exchequer Chamber, as it was given, for the Defendants in Error, and that a *venire de novo* ought not to have been awarded.

One contention on the part of the railway company, the Plaintiffs in Error, and probably that upon which they really meant to found their defence, was that the enactments imposing upon them equality of charge (7 & 8 Vict. c. iii., s. 50; and 8 & 9 Vict. c. 20, s. 90) are inapplicable to small parcels not exceeding 500 lbs. in weight, for which, therefore, they are entitled to make any charge they think fit. This, however, is unsustainable, because those enactments are quite consistent with, and are in terms applicable to, and govern, for the benefit of the public generally, whether carriers or not, the small parcels business. They have been so understood and repeatedly so applied for a long period, and the Legislature has not thought proper to undo what has been the understood doctrine of the Courts, well established by decision, that except so far as juries may find (what they have often negatived) that in point of fact carriage for collecting carriers imposes greater risk or expense upon the company, such carriers are entitled to have their packed parcels carried *upon the railway* for the same price as other persons. This gives no preference to rivals in trade; it only puts the carriers upon an equality with the rest of the public as to the price of the same work done for them by the company.

The question what is the meaning of the equality clause when it speaks of things of "like description" conveyed under "the like circumstances" ought, I think, to be answered by saying that things are of a "like description" when, although their composition and structure are not "identical," which would be expressed by "the same description," not "like description," they are similar in those qualities which affect the risk and expense of carriage, and that they are conveyed under like circumstances where the route, risk, and expense are in the opinion of a jury the same, otherwise not. For instance, bags of red wheat and bags of white wheat are of like description; and bags of cotton and bags of jute of like weight and value are of the like description, if there be no dis-

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severing circumstance proved; but if it were superadded that one was really more risky or troublesome to carry than the other the jury would hold that the goods were of different descriptions, and bags of silk may be suggested as an instance in which a jury would be sure so to hold. Cattle, which would be more troublesome and more exposed to risk than inanimate things, would be an instance of dissimilarity. So of horses, as less manageable than other cattle, and requiring special precautions. In the absence of a tariff the question ought, I think, to be in fact whether the sort of thing was like or different for the purposes of carriage, that being the subject dealt with. The railway company might also make a distinction between the prices charged to all the world for articles not distinguished in this respect, because of there being great traffic in one, and small in another, as, for instance, in the carriage of coals and the carriage of culm from a district in which the one was abundant and the other not so, to such an extent that the former employed a greater number of waggons with a less expensive staff, the price of carriage being proved to depend more upon the wages of the staff than upon the wear and tear of the waggons. There are cases in which custom founded upon convenience makes a distinction such as that between "weight" goods and "measurement" goods, where so much by weight is charged for the one class and so much by space for the other; and I can conceive it possible that the same goods may be so differently packed as to pass from one class to the other, thus ceasing to be of a like description for the purpose of carriage, though their component particles and the structure of each fibre remain the same. So there may be a good distinction between things specifically charged either by custom or tariff and "miscellaneous" goods. There can be no practical difficulty in marshalling the goods under descriptions, and stating the amount of charge that companies choose to make for carriage *upon the railway* of specified sorts, and the amount they choose to charge for goods not falling within the specified sorts. In the ordinary case of a railway company's tariff the company makes this distinction, and gives notice of it to the public; nor can any objection be made, so long as the charge does not violate the common law by being unreasonable, or the statute by preferring one person to another. It is a question of fact

for a jury whether these limitations have been transgressed. In effect I think the phrase "like description" is exhausted upon the goods, and "like circumstances" upon the route, expense, and risk of carriage, and that neither can be extended to the personal qualities of the individual who sends the goods.

The direction to the jurors was not absolute to find for the Plaintiff, but it was that there was "*evidence* upon which they *might* find that parcels had been carried by the Defendants for other persons containing goods of a like description and under like circumstances at a less rate than such goods were carried by them for the Plaintiff, and also upon which they *might* find that the Defendants knowingly and purposely charged the Plaintiff more than other persons, and that *if* the jury believed that the Defendants knowingly and purposely charged the Plaintiff at a higher rate than other persons upon a packed parcel of goods, they ought to find a verdict for the Plaintiff."

I am therefore at a loss to see what question of amount of evidence here arises. The Defendants having the opportunity of explanation offer none. They accept the evidence of the Plaintiff as true, and unless it can be affirmed that the question of likeness is not one of fact for the jury, and that it is no cause of action upon the equality clause that the Defendants charged the Plaintiff for the carriage of his goods a sum larger than that which they charged at the same time to other persons in respect of goods which they, knowing that they were of a like description and quantity, carried along the same line under like circumstances as to risk and expense, the learned Judge's direction is unexceptionable.

As to the formal objections, since the *Common Law Procedure Act* at least, I think the form of action is out of the question. But I must say I have always understood that when a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by *condictio indebiti*, or action for money had and received. This is every day's practice as to excess freight.

As for the formal exceptions to evidence they fail, because the

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evidence tendered was either to shew a practice that a customer of the Defendants had his goods carried by the Defendants for less than the Plaintiff, as in case of the first exception, or knowledge of the general practice acquired by officers of the company, by whom only they can acquire knowledge, as in case of the second exception, or general usage of trade, as in case of the third exception. I do not dwell upon them, because for mere superfluity, in the sense of redundancy of evidence, I apprehend no bill of exceptions is maintainable, and also because the question whether the evidence was admissible and whether the summing up was sustainable is substantially the same.

With profound respect, therefore, for the opinion of my Brother *Bramwell*, and reverence which I cannot express in words for that of the dissenting Judge in the Exchequer Chamber, whose opinions, even separately, I far prefer to my own, I must answer that udgment was rightly given in the Common Pleas for the Defendant in Error.

MR. BARON BRAMWELL :—

My Lords,—The question is, whether there was evidence to go to the jury in support of the Plaintiff's case; not a mere *scintilla*, but such as ought to have been left to them, and on which they might have acted.

It is necessary to see what the Plaintiff's case was. He did not say that the Defendant had no right to charge him the sums they had charged, provided they charged others equally with him, but he said that he was charged more than others, who were knowingly and wilfully charged by the Defendants less than he was for parcels of the like description carried under the like circumstances as his, and that that being contrary to the statute, and to his prejudice, he had a right of action. No question arises as to the form of pleadings or amount of damages.

I think the Plaintiff's proposition correct in point of law, viz., that if the charge to the public *generally*, the *ordinary* charge, is so much for certain goods, and one person is charged more for goods of a like description and quantity, and under the like circumstances, he has a right of action.

In the first place it seems to me that the equality clause applies.

By sect. 1 of 10 & 11 Vict. c. ccxxvi., all provisions, matters, and things contained in former statutes of the company, unless inconsistent, are to extend to that Act. It may be shewn that the equality clause and small parcels clause are not inconsistent, by reading them together, the former as a proviso on the latter. Then if one person is charged more than the *ordinary* charge the statute is infringed, and being infringed to his prejudice, an action lies. Whether if *one* was charged less than *all others*, actions would lie by them, and for how long back, or how many being less charged would give such right of action to others, are questions that do not arise, as it seems to me; for there is evidence that the Defendants *habitually* charged the wholesale houses less for packed parcels than they charged the Plaintiff; and though those houses are only four in number, yet as there is no evidence that the Defendants received packed parcels from persons other than the wholesale houses and the Plaintiff, I think there is evidence that the ordinary rate charged for packed parcels was lower than that charged to the Plaintiff. There is also evidence that they did this knowingly, and as they made no effort to do otherwise, I think there is evidence that they did it wilfully. I am far from saying that the jury ought so to have found, for I do not see how the Defendants could help themselves; but I think there was a fragment of evidence for the jury on all these points, though I think their verdict wrong on all; consequently it seems to me that the question is reduced to this, whether there was evidence that the parcels of the Plaintiff contained goods of a like description as those of the wholesale houses. I think there was no such evidence.

It is necessary first to examine the equality clause. I think the construction of the 7 & 8 Vict. c. iii. s. 50, is, that "under the like circumstance," is to be coupled with "conveyed in or propelled," and "passing." The meaning of that section by itself might be doubtful, but it must be the same as that of the 8 & 9 Vict. c. 20, s. 90, as to which there can be no doubt. But this seems to me immaterial, for the following reasons: If these words do not help the Defendants, at all events they do not hurt. Then read the sections with or without them; 8 & 9 Vict. c. 20, s. 90, recites that the power of varying tolls should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose

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of collusively and unfairly creating a monopoly in the hands of the company or of particular parties. It then gives the power to vary, with the equality clause as a proviso, charges on all goods of the same description; and it enacts that no reduction or advance on any such tolls shall be made, either directly or indirectly, in *favour of or against any particular* company or person travelling upon or using the railway. So 7 & 8 Vict. c. iii. s. 50, in like way says no reduction or advance on any of such charges shall be made *partially*, either directly or indirectly, in favour of or against any particular company or person. It seems to me impossible to read these clauses without seeing that they were designed to prevent an attempt at monopoly in the company (which is not here the question, and of which there is no evidence), and a preference of one or more, or a distinction to the prejudice of one or more. The words "and no reduction, &c., shall be made either in favour of or against any particular company or person," seem to suppose that there may be a difference, if it is not in favour of or against any particular person; as, for instance, that goods brought from town *A.* might be charged less than the same description from town *B.* Suppose town *B.* had water conveyance, and town *A.* had not, or suppose that town *B.* were much nearer another railway than town *A.*, might not a difference be made, even though both towns used the same station. It seems to me that such differences could be made. It would not be a breach of the equality clause. See *Nicholson* v. *The Great Western Railway Company* (1); *Ransome* v. *The Great Eastern Railway Company* (2).

It seems to me, therefore, that "under the like circumstances," or some similar expression, is necessarily found in the first part of the equality clause. At all events, there are the words "same or like description and quantity," and any difference is enough to prevent a breach of the proviso against partiality, or favour of or against any particular person. It would be infringed if other packed parcel carriers were charged like the wholesale houses whilst the Plaintiff was not. It would be infringed if one wholesale house were charged as the Plaintiff is and the others were not. As it is, it seems to me not infringed.

(1) 5 C. B. (N.S.) 366. 4 Jur. N.S. 1187.

(2) 4 C. B. (N.S.) 135, 159; 27 L. J. (N.S.) C. P. 166. 4 Jur. N.S. 282

For what are the facts? The Plaintiff is a carrier, and forwards the property of others, never his own. The wholesale houses are not carriers, and principally forward their own goods. The Plaintiff forwards all sorts of goods, no doubt principally drapery, but still he does forward all sorts. The wholesale houses do not. *All* the Plaintiff's packages are packed. *All* those of the wholesale houses are not. According to the evidence of *Hill*, only 50 to 100 out of 700 to 1000. The Plaintiff is paid for what he forwards; the wholesale houses are not. What they do they do for their mutual accommodation, and that of their friends and customers. What the Plaintiff does is for profit. How can it be said that the goods the wholesale houses send are of a like description and quantity as those of the Plaintiff, or that the circumstances are such that a reduction has been made in favour of the wholesale houses *partially*, or an advance *partially* against the Plaintiff, within the meaning of the equality clause?

These last words shew the meaning and intent of the statute. It was to prevent practically the preferences of one person or persons over another or others. Can it be said there is anything of the sort here? Is it supposed that the Plaintiff would forward any more goods if the wholesale houses were charged more, or that they would forward less if the Plaintiff was charged less? I have said, and I think (though with great doubt), that there was evidence that the ordinary charge of the Defendants for packed parcels was that made to the wholesale houses. But suppose it appeared that there were fifty intercepting carriers all charged as the Plaintiff is, I should think the Defendants would be at liberty to make a difference to the wholesale houses, either in their favour or against them, on account of the difference in the cases. One of the houses is represented to send out 700 to 1000 parcels a day, not all by the Defendants' railway, indeed, but probably many, why may not the Defendants in favour of such large customers carry a few packed parcels for them without extra charge? It is not done "partially in favour of or against any particular person" within the meaning of the equality clause. It is to be observed that the question is not whether it is *reasonable* to make a difference in the charge for the Plaintiff's parcels and those of the wholesale houses. If there is a difference in the parcel, if it is not

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the "like description," if in the circumstances it differs, the Defendants have a right to make a difference in the charge. They may make one charge for cast iron and another for wrought, though they could give no reason why, provided they charged all alike.

An argument has been used which, with great submission, seems to me a strange one. It is said that the Defendants, by their tariff, have made all packed parcels of a like description by putting them under one heading in their tariff. Now, there is no obligation to have or publish a tariff. The one in use may be changed to-morrow, and it would be strange if the only effect of your Lordships' decision was to make the Defendants publish a new tariff with one heading and rate for packed parcels of drapery and books, and another heading and rate for other packed parcels. Surely the heading of the tariff does not make a hamper with a clock, a ham, a barometer, &c., of the like description as 100 yards of flannel and 100 yards of calico.

The Plaintiff's counsel declared that the result of a decision against the Plaintiff would be to ruin his trade. It would not. It might compel him to raise his prices to the public, but it would carry into effect the intention of the Legislature, viz., to give to the Defendants the profit, or part of the profit, of the carriage of small parcels, which at present is diverted from them.

It is in vain to trouble your Lordships with the decisions. The present question comes before your Lordships' House for the first time. It is not pretended that it is so settled as not to be capable of a decision in the Defendants' favour, to which it seems to me that they are entitled.

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July 13. LORD CHELMSFORD:—

My Lords, this is a proceeding in Error upon a judgment of the Court of Exchequer Chamber affirming a judgment of the Court of Exchequer in favour of the Defendant in Error. The action was brought to recover from the *Great Western Railway Company* the sum of £961 13*s.* 1*d.*, being the amount of alleged overcharges made upon certain parcels of goods carried on the railway for the Plaintiff. The declaration contained common counts for money

had and received, and upon an account stated, to which the Defendants pleaded never indebted.

The material facts upon which the judgment of the Court below proceeded are stated upon the bill of exceptions tendered by the Defendants at the trial, and the questions to be determined upon the appeal are:—1st. Whether there was evidence to go to the jury that the Defendants knowingly and purposely charged the Plaintiff at a higher rate than other persons for the carriage of packed parcels of goods. 2nd. Whether the Judge was right in admitting certain evidence in proof of such different rate of charge. 3rd. Whether, supposing the different rate of charge to the Plaintiff and other persons to have been established, an action for money had and received is maintainable to recover back the amount proved to be overcharged to the Plaintiff upon packed parcels, by comparison with what was charged to other persons for similar parcels.

The Plaintiff is a carrier in *London*, and his principal business is to collect parcels of goods from various wholesale houses, to pack them together in one parcel, and send the parcels so packed by the Defendants' railway to his agents in the country, who unpack and distribute the enclosed parcels to the different persons to whom they are addressed. The carmen of the Plaintiff who convey the parcels to the railway station always take with them a printed form of declaration, with different headings, furnished by the Defendants, amongst which are columns for the name and address of the consignee, the description of package and contents, and at the foot of the declaration is a notice that "all parcels of goods and packages, the contents of which are not properly declared by the senders, will be charged with the highest class, and all such parcels of goods and packages not exceeding 500 lbs. in weight, if the contents shall not be declared, will be considered as each containing different kinds of articles, and each such parcel of goods and package will accordingly be subject to the regulation relating to 'smalls,' and charged for accordingly."

Before the goods leave the Plaintiff's office he fills up the different columns of the declaration, except those headed respectively "weight," "paid," and "remarks," and every parcel containing several parcels of different kinds of goods is always described by Plaintiff as "packed."

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The Defendants charge for the carriage of goods, according to their nature and description, by a tariff headed "Rates from *London*," "On goods and parcels above 1 cwt. and under 500 lbs. by luggage trains," containing five columns of increasing rates of charge, and a column headed "Class—Packed parcels," stating the charge for them to be "42*s.* 6*d.*" (being the charge at the 5th, or highest, rate), "and 50 per cent."

All the packed parcels carried for the Plaintiff were charged at this rate, which, looking to the Plaintiff's parcels only, would be a correct charge. But the ground of the Plaintiff's action against the Defendants is, that they have been in the habit of charging the packed parcels of other persons carried by their railway at a lower rate than they charged the packed parcels of the Plaintiff, which, he contends, by their Acts of Parliament they have no right to do. For the purpose of proving this difference of charge the Plaintiff produced the evidence (which was excepted to) of certain wholesale warehousemen and drapers in *London* who were in the habit of enclosing in one package or hamper various descriptions of goods, not only for their own customers, but also for the customers of other houses; and he proved that the Defendants always charged for the carriage of their packed parcels at the 4th class rate in the tariff, being the rate appropriated to drapery goods, and never charged the extra rate of 50 per cent. on any of their packages. One witness (the clerk of Messrs. *Morley*, warehousemen) stated that the Defendants were perfectly aware of the practice of the houses as to packed parcels, but that they could not tell from the outside of any particular parcel whether it was packed or not. The Plaintiff also gave evidence (which was excepted to) that in the year 1849, upon an arbitration between another carrier and the Defendants, witnesses proved, in the presence of the Defendants, their solicitor, and traffic manager, the practice of houses in *London* of packing parcels together containing the goods of various persons, and sending them by the Defendants' railway, and that the practice of packing parcels had been for the last forty years so general as to be notorious among carriers.

Upon this evidence the learned Judge directed the jurymen that there was evidence upon which they might find that parcels had been carried by the Defendants for other persons, containing

goods of a "like description, and under like circumstances," at a less rate than such goods were carried by them for the Plaintiff, and also upon which they might find that the Defendants knowingly and purposely charged the Plaintiff more than other persons. And upon this direction the jury found a verdict for the Plaintiff.

The obligation of the Defendants to carry goods "of the like description, and under like circumstances," at the same rate of charge for all persons alike, is imposed upon them by Acts of Parliament relating to their railway.

The special Act of the Defendants, the 10 & 11 Vict. c. ccxxvi., makes all the provisions of the company's previous Acts parts of that Act, as if they had been repeated and re-enacted in it, and incorporates with it the *Railways Clauses Consolidation Act*, 1845. By one of the previous Acts of the Defendants, 7 & 8 Vict. c. iii., s. 50, the Defendants are empowered to charge for their locomotive, or steam power, and carriages, either per ton, or per mile, or by bulk, measure, number, or admeasurement, or by fixed charges, as they shall think expedient: provided that in whatever way the charges are made they shall be made equally to all persons in respect of all goods, wares, and merchandise, articles, matters, and things, of a like description and quantity, and conveyed in, or propelled by, a like carriage or engine, passing over the same portion of and over the same distance along the railway, and under the like circumstances.

There is a similar provision for equality of charge by railway companies in the *Railways Clauses Consolidation Act*, but a little differently worded. The 90th section of that Act gives power to a company to alter or vary the tolls by the special Act authorized to be taken, "provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all goods of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway, under the same circumstances."

By the 53rd section of the 10 & 11 Vict. c. ccxxvi., it is enacted, that notwithstanding the rate of tolls prescribed by the Act for "parcels not exceeding 500 lbs. each, the company may demand any sum they think fit."

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Lord Chief Justice *Erle*, in *Baxendale* v. *The Great Western Railway Company* (1), said, that the incorporated clause of the 10 & 11 Vict. c. ccxxvi. did not, by incorporating former Acts, incorporate therewith the clauses for making equal charges under like circumstances, because, "First, the incorporation of the former Acts is 'only so far as they may be consistent with the clauses of the Act in question;' and a grant of absolute power is inconsistent with a clause which would reduce it to a power restricted by a condition; and, secondly, the equality clauses in the former Acts, if they were inserted in the 10 & 11 Vict. c. ccxxvi. would not affect the power granted by the 53rd section of the latter Act, as the equality clauses in the special Acts relate to the powers of charging *granted by those Acts;* and the equality clause in the 8 & 9 Vict. c. 20, s. 90 (the general Act), relates to a power of varying charges from time to time, and restricts *that power* by the condition that it shall be exercised impartially, so as to charge equally under like circumstances."

With great respect for the learned Judge, I cannot help thinking that the reasoning here employed is erroneous. I will not stop to consider whether a provision that a power given to companies to vary their tolls, provided that at all times the tolls be charged equally to all persons, does not almost necessarily imply that, before the variation, the tolls have been charged equally upon all. But the notion that the clauses for making equal charges are inconsistent with the power given to the Defendants by the 53rd section of the 10 & 11 Vict. c. ccxxvi., to demand any sum they think fit for parcels not exceeding 500 lbs., appears to me to be unfounded. The learned Judge likens it to a grant of absolute power afterwards restricted by a condition. But the absolute power to demand any sum the Defendants may think fit is not reduced to a conditional one by requiring that the tolls shall be equally charged to all persons, nor does this even operate as a qualification of the power itself. The power may be exercised at the discretion of the Defendants, but charging one person what they think fit, they must charge the same to others. This does not render the power a conditional one, because the condition only attaches after the power has been exercised.

(1) 14 C. B. (N.S.) 25.

It was argued at your Lordships' Bar, as it was held by Lord Chief Justice *Erle* (who differed from the other Judges in the Exchequer Chamber), that the extra charge for packing made lawful by the 53rd section of the 10 & 11 Vict. c. ccxxvi., is not within the 50th section of the 7 & 8 Vict. c. iii., which "authorizes charges to be made per ton, or per mile, or by bulk, number, or admeasurement, or by fixed charges, and that it cannot be brought within the condition for equality of charge in that section in respect of goods of like description and quantity, as the parcel charge is in part, and may be entirely, irrespective both of the description of the goods and of their quantity." But it appears to me to be too narrow a view of the equality clause, and of the intention of the Legislature in enacting it, to deny its application to the charges made in respect of the carriage of the Plaintiff's goods. The enumeration of the different modes in which the Defendants may think proper to make their charges for the carriage of goods is evidently intended to cover every case.

It is true that the Defendants might make an arbitrary charge under the 53rd section, without reference to the description or quantity of the goods. But that is not what they have done. They have charged the Plaintiff at the rate of so much per ton, and 50 per cent. in addition. This is, in the first place, a tonnage charge, and it may, perhaps, be considered altogether so, as the 50 per cent. is an addition which depends on the ascertained charge calculated at so much per ton. But, at all events, it must be admitted to be a compound charge at so much per ton, and an additional fixed charge of 50 per cent., and therefore within the express words of the 50th section of the 7 & 8 Vict. c. iii.

The intention of the Legislature was to place all persons having their goods carried by the railway upon an equal footing; and as by the 53rd section of the 10 & 11 Vict. c. ccxxvi. the Defendants may charge what they think fit for small parcels (of course within a reasonable limit), there is the stronger ground for assuming that, in this case more than any other, the obligation of equality of charge to all persons alike would be imposed upon them where such an opportunity would be afforded (in the words of the 90th section of the *Railways Clauses Act*) "of prejudicing or favouring particular parties, or of collusively and unfairly creating a

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monopoly either in the hands of the company or of particular parties."

It having been seen that both the equality clause in the 7 & 8 Vict. c. iii. s. 50, and in the *Railways Clauses Act* apply, the question arises, what is the meaning of the words "Goods, &c. of a *like* description and quantity, and conveyed along the railway, and under the *like* circumstances" in the private Act, and the words "goods of the *same* description" and "under the *same* circumstances," in the *Railways Clauses Act*.

It is extremely difficult to understand exactly what the Legislature meant by goods of "a *like* description" and even by the words "of the *same* description," though at first sight more capable of interpretation, because the word "same" is constantly used in popular language for "similar." It seems to me that the words "same" and "like" have not different meanings in the two Acts, and that the words must be used not with reference to the contents of parcels, which the Defendants have no means of knowing, but to the parcels themselves, "whether" (as Mr. Justice *Willes* said in answer to your Lordships' questions to the Judges) "they were like or different for the purpose of carriage."

I have felt greater difficulty in ascertaining the meaning of the words "under the same" or "under like circumstances." I do not see, however, how they can relate to anything else than the conveyance of the goods. To say that because the Plaintiff is (what has been called) an intercepting carrier, and the other persons using the railway are wholesale dealers, therefore the goods are not conveyed along the railway under the like circumstances, is an application of the words which I am unable to comprehend.

At the trial the learned Judge directed the jury "that the evidence given on the part of the Plaintiff was evidence upon which they might find that parcels had been carried by the Defendants for other persons containing goods of a like description and under like circumstances at a less rate than such goods were carried by them for the Plaintiff." But he gave the jurors no assistance as to the meaning of the words themselves. His direction, therefore, was imperfect, but I understood it to have been agreed, upon the argument at your Lordships' Bar, that no objection was

to be made to it in this respect, even if any such objection would have been within the exceptions.

The exceptions to the direction of the learned Judge to the jury turned entirely upon the insufficiency of the evidence to establish the Plaintiff's case. The counsel for the Defendants contended that the learned Judge ought to have directed the jury "that there was no evidence that parcels were carried by the Defendants for other persons, containing goods of a like description and under like circumstances, at a less rate than such goods were carried by them for the Plaintiff;" and that "there was no evidence of the specific contents of any of the Plaintiff's parcels from which the jury ought to infer a specific inequality upon any parcels between the rate charged to the Plaintiff and to other persons; and that there was no evidence that the Defendants knowingly and wilfully charged the Plaintiff more than other persons." It is difficult to see how the Plaintiff could prove that the Defendants had violated the obligation imposed upon them by the Acts of Parliament otherwise than by the evidence which he produced. If proof of specific inequality in the rates charged to the Plaintiff and to other persons upon particular parcels were necessary, it would prevent the possibility of establishing any case of this description against the Defendants. It was proved by persons in the employ of the wholesale houses which are in the habit of sending packed parcels by the railway, that the Defendants could not tell from the outside of the parcels whether they were packed or not. Of course, therefore, the Plaintiff could have no knowledge or means of knowledge of the specific contents of any particular parcel sent from these houses. The only available evidence to establish the Plaintiff's case was the general proof which he gave that the wholesale houses had for years been in the habit of sending packed parcels by the railway, and that the Defendants had long known of this practice; and especially that with respect to one of the houses (Messrs. *Morley*) the Defendants were perfectly aware of their habit of sending packed parcels. The Plaintiff also proved knowledge brought home to the Defendants through their solicitors and traffic manager, by the evidence of witnesses given in their presence, of the practice of houses in *London* of packing parcels and sending them by the Defendants' railways. This evi-

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dence was excepted to; but it appears to me that it was properly admitted for the purpose of proving the knowledge of the practice of the wholesale houses in *London* to pack parcels, which the Defendants learnt through the traffic manager, their agent in all matters relating to the traffic. The whole of the foregoing evidence constituted the proper mode of proving that the Defendants knowingly and purposely charged the Plaintiff at a higher rate than other persons upon packed parcels of goods. It was argued that as the Defendants did not and could not know the contents of any particular parcel sent by the wholesale houses, they could not impose upon them the charge for packed parcels. But as the Defendants knew perfectly well that it was the constant practice of these houses to send packed parcels, if they desired to obey the Acts of Parliament, and to avoid inequality of charge, they might have given notice that every parcel the contents of which were not declared would be treated as a packed parcel, and charged accordingly. This would have compelled the senders of parcels of this description to state what parcels contained enclosures of other persons and what not. It appears to me to be perfectly clear that proof of specific instances of inequality of charge was unnecessary. If it were, the provisions of the Acts of Parliament might be disregarded with impunity, and injustice might be done by the company favouring one person and prejudicing another, and the party injured would be wholly without remedy.

2 Q B D 248

The last subject to be considered is the form of the action; whether an action for money had and received will lie to recover back overcharges made upon the carriage of the Plaintiff's goods, not absolutely, but relatively to the charges made to other persons. It was argued for the Defendants that the charge upon the Plaintiff's packed parcels being warranted by the 10 & 11 Vict. c. ccxxvi., and being reasonable, and within the absolute discretion of the company, the Plaintiff was not injured by other persons being charged less than he was. But this is a fallacious way of viewing the question. The Plaintiff's complaint is not that others are charged less than himself, but that the fact of their having been charged less entitled him to claim the same rate of charge, and that all beyond that rate is overcharge. The very fact of the smaller charge to others is the ground of his complaint of an overcharge to himself.

Now if the Defendants were bound to charge the Plaintiff for the carriage of his goods a less sum, and they refused to carry them except upon payment of a greater sum, as he was compelled to pay the amount demanded, and could not otherwise have his goods carried, the case falls within the principle of several decided cases, in which it has been held that money which a party has been wrongfully compelled to pay under circumstances in which he was unable to resist the imposition, may be recovered back in an action for money had and received. In the language of the Court of Common Pleas, in the case of *Parker* v. *The Great Western Railway Company* (1), "the payments made by the Plaintiff were not voluntary, but were made in order to induce the company to do that which they were bound to do without them."

In another case of *Parker* v. *The Great Western Railway Company* (2), and in *Edwards and Another* (*Assignee of Parker*) v. *The Great Western Railway Company* (3), the Plaintiffs recovered in actions for money had and received overcharges of a similar description to those in the present case.

I am unable, from the report of the case of *Garton* v. *The Bristol and Exeter Railway Company* (4), to understand the ground on which it was held by the Court of Queen's Bench, whose judgment was delivered by the Lord Chief Justice, that money had and received would not lie to recover back overcharges made in violation of an obligation imposed upon the company by Act of Parliament to charge all persons equally. But in the subsequent case of *Baxendale and Others* v. *The Great Western Railway Company* (5), in the Exchequer Chamber, the Lord Chief Justice of the Queen's Bench, in delivering the judgment of the Court, said (6): "As to the question whether an action for money had and received will lie, which seems to have been one of the numerous points discussed in *Parker* v. *The Great Western Railway Company* (7), we think that if the judgment of the Court of Queen's Bench in that case, went the length of holding that it would not, this Court ought not to be held bound by it."

(1) 7 Man. & G. 253.
(2) 11 C. B. 545.
(3) Ibid. 588.
(4) 1 B. & S. 112.
(5) 16 C. B. (N.S.) 137.
(6) 16 C. B. (N.S.) 140.
(7) 6 El. & Bl. 77; see also *Garton* v. *The Bristol and Exeter Railway Company*, 1 B. & S. 112.

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I am of opinion that the judgment of the Court of Exchequer Chamber, affirming the judgment of the Court of Exchequer, is right, and ought to be affirmed.

LORD COLONSAY entirely agreed with the judgment proposed, and the reasons given for it.

LORD CAIRNS, who had seen and considered the reasons advanced by his noble and learned friend in support of the judgment, entirely concurred with them.

Judgment affirmed.

Lords' Journals, 13th July, 1869.

Attorneys for the Defendant below, the Plaintiffs in Error: *Young, Maples, Teesdale, & Nelson.*

Attorney for the Plaintiff below, the Defendant in Error: *J. C. Dalton.*

GANN . . . . . APPELLANT; 1869 June 24.

AND

JOHNSON AND ANOTHER . . . . . RESPONDENTS.

Practice.

Where two cases strongly resemble each other in point of fact, but the allegations of fact are not the same in each, the record in one cannot be referred to for the purpose of explaining or supplying anything doubtful in the other.

IN this case the same question was raised upon the same facts as in *Gann* v. *The Free Fishers of Whitstable* (1). When the case was called on,

Mr. *Denman*, Q.C., on behalf of the Respondents, applied to have the hearing postponed until after that of *Foreman* v. *The Free Fishers of Whitstable*, upon the ground that important facts had come to light in *Foreman's Case* which might materially affect the judgment in this case.

LORD CHELMSFORD:—We cannot import into one case facts which appear in another. We can only deal with the facts as they appear within the four corners of the record in each case.

Application refused.

Mr. *Denman* then announced that he was not, on the part of the Respondents, prepared to proceed with the case of *Gann* v. *Johnson*.

LORD CHELMSFORD:—It is precisely the same as that formerly decided in this House, and must follow its fate.

Judgment reversed.

(1) 11 H. L. C. 192.

(1) Reported post p. 285.

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June 24, 25, 28; *July* 13.

RICHARD JOHN FOREMAN . . . . . APPELLANT;

AND

THE FREE FISHERS AND DREDGERS OF WHITSTABLE . . . . . RESPONDENTS.

Port—Toll.

However commodious a place may be for the shelter of vessels, it will not therefore be a port, the establishment of which must be by authority of the Crown.

But, if so established, then, whether naturally or artificially formed so as to shelter vessels, a consideration for anchor dues arises.

Where it had been found on inquisition in the reign of *Edward* I. that a grantee of the Crown had had "from time whereof memory is not . . . wreck of the sea and toll with merchandize in the manor," and in the reign of *Edward* II. proclamations had been made to seize, in certain places (of which this manor was named as one), "where ships ply by the coast," &c., letters coming from abroad—and in the reign of *Elizabeth* a return to a Royal Commission mentioned the manor as a creek of one of the *Cinque Ports*, and many documents, some of them grants from the Crown, and others deeds under which the manor had from time to time been enjoyed, spoke of "tolls," and deputations had been issued by the owners of the manor to collect the tolls of all vessels anchoring there, and tolls had been so collected beyond the time of living memory, and a private Act of Parliament had adopted these expressions in authorizing the conveyance of the manor to a company thereby incorporated:—

Held, that there was enough to justify the inference that a port did exist, and that a toll claimed, as a port or anchorage toll, had a legal origin.

THIS was an appeal against a decision of the Court of Exchequer Chamber, by which a previous decision of the Court of Common Pleas had been affirmed (1). The facts had been, under an order of Mr. Baron *Martin*, stated in the form of a special case for the opinion of the Court.

The Respondents had brought an action for tolls in respect of the anchorage of the Appellant's vessel within the limits of their port in the manor of *Whitstable*, and the following is a summary of the facts set out in the special case (2).

The declaration was in debt. The Defendant pleaded never indebted.

(1) Law Rep. 2 C. P. 688; 3 C. P. 578.

(2) Nothing more than a summary is here given, all the circumstances having been fully set forth in the report of the case in Law Rep. 2 C. P. 688.

The Plaintiffs were the Free Fishers and Dredgers of *Whitstable*, who had been incorporated by the Act 33 Geo. 3, c. xlii., which recited that there had been, time out of mind, an oyster fishery within the limits of the manor and royalty of *Whitstable*, extending from the sea beach a very considerable distance into the sea, and managed at the expense of the free dredgers, who held the same as tenants of the manor and royalty on payment of a certain annual rent.

The action was brought in respect of the Defendant's vessel, the *Sancho Panza*, casting anchor at *Whitstable* on three separate occasions, the charge made being 1*s.* for each casting of the anchor. On the 14th of September and the 31st of October, 1850, this was alleged to have been done within the anchorage-ground somewhat below ordinary low water-mark. On the 27th of November it was between high and low water-mark, but upon ground which had been conveyed by the Plaintiffs, in the year 1828, to the *South-Eastern Railway Company*. These positions were described in a map which was to be taken as part of the case.

The anchorage-ground abuts north on land belonging to the manor of *Faversham*, and is divided therefrom in part by grass banks, and a bank of shingle and stone called the *Redge* [*qu. Ridge*]; south on the sea-beach at *Whitstable;* east on banks of shingle and stone, commonly known as the *Street* (which dries at four hours' ebb of the sea), extending from the sea beach up to the *Redge;* and west on the mainland of the county of *Kent* and the *Isle of Sheppey*. The said land is situated at the mouth of the *East Swale*, between the mainland of *Kent* and the *Isle of Sheppey*.

The Plaintiffs, and those under whom they claim, have from time beyond living memory taken the sum of 1*s.* from every vessel casting anchor within the limits of the anchorage-ground, whether such anchoring was voluntary or from necessity.

The anchorage-ground at *Whitstable* is safe in blowing weather through being sheltered by the *Isle of Sheppey*, the mainland of *Kent*, and the *Street* and the *Redge*, which are natural breakwaters.

The Plaintiffs are the owners of oyster beds which lie to the north and east of the anchorage-ground at *Whitstable*. The limits of these beds are indicated on the north by lines of poles, and on the western boundary by a line of buoys and beacons maintained

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by the Plaintiffs. The anchorage-ground is inclosed by the oyster-beds on the north and east ends; as all vessels take the ground at low water, the poles, buoys, and beacons indicate where a vessel may anchor without the risk of grounding upon and injuring the oysters. There are no buoys or beacons indicating the anchorage-ground except those maintained by the Plaintiffs. The Plaintiffs also keep two boats for protection of the oyster-beds from thieves and to warn vessels against injuring the oysters. Since 1858 these watch-boats have been provided with lights, but the lights are put out when one boat is in less than fourteen feet and the other in less than seven feet of water at the moorings. In very rough weather both boats are compelled to leave their moorings.

Vessels sailing into the anchorage-ground derive some aid from the lights in the watch-boats, so long as they are kept up, but are chiefly guided by a harbour light belonging to the railway company, which is constantly kept burning. The buoys, which indicate the Plaintiffs' oyster-beds, point out the channel which is safe for fishing boats and vessels of small draft of water, but is not ordinarily used for other vessels. The light of the *South-Eastern Railway Company* affords most valuable aid to vessels endeavouring to make the anchorage-ground. The members of the Plaintiffs' company do not dredge or work their ground after dark.

Between 1816 and 1828 a man named *Reeves*, who was employed in the Plaintiffs' company, exhibited a light from a mast erected on his premises, the expense of which was defrayed by voluntary contributions from the Plaintiffs' company and from the shipowners of *Whitstable*. Latterly, the light was unsatisfactorily maintained, the contributions ceased, and the light was for some time altogether discontinued. *Reeves'* example was followed in 1832 by a person named *Perkins*. In 1838 one *Richards* succeeded *Perkins* in the management of this light, but it practically ceased to be exhibited in 1845. In 1846, *George Clay* (in the employment of the *South-Eastern Railway Company*) proposed to the Plaintiffs' company and to the ship-owners at *Whitstable* to exhibit a light upon receiving £6 a year from the Plaintiffs' company, and a tonnage of one farthing per ton on ships entering the harbour. The proposal was accepted, but at the end of two years the Plaintiffs' company discontinued the payments; the tonnage dues have,

however, been regularly paid, and the light has been constantly exhibited.

The only proofs of any payment by the Plaintiffs' company towards maintaining a light before 1816 are the following entries made in the books of the Plaintiffs' company by a former treasurer:—

	£	s.	d.
1777. June 29. Paid Mr. *Matthew Browne* three pounds three shillings for one year's use of the light	3	3	0
1778. May 12. Paid *Matthew Browne* four pounds four shillings for one year's use of the light . .	4	4	0

The books of the Plaintiffs' company contain the following entries with reference to the buoys and beacons:—

	£	s.	d.
1773. Sept. 25. Paid Mr. *Abram Jatsom* for 28 lbs. of lead to run in the stones for the use of the buoys, and his time, five shillings and eight pence	0	5	8
Paid Mr. *Thomas Turner* for a cable to lay with the buoys, one hundred and a half, seven shillings and sixpence	0	7	6

And there were four other entries of an exactly similar sort for the years 1774, 1775, and 1776.

The only advertisements inserted in the *Kentish Gazette* with reference to this subject, were two, which appeared on the 15th and the 18th of December, 1773, and were in the following terms:—

"*Whitstable*, December, 1773.

"Notice is hereby given

"That the Company of Free Fishers and Dredgers of the manor and royalty of *Whitstable*, in the county of *Kent*, have lately put and placed down buoys to mark out and distinguish the boundaries of the said manor and royalty, and that every person who shall hereafter trespass upon the said free fishery and royalty by dredging for, or taking any of the oysters, or do any damage to the said buoys belonging to the said free fishers and dredgers, will be prosecuted for the same with the utmost rigour of the law, and every person who shall give information of any offender or offenders herein, shall, upon the conviction of every such offender or offenders, receive a reward of two guineas over and above all reasonable

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charges, of the foreman of the said Company of Free Fishers and Dredgers of *Whitstable* aforesaid."

The manor of *Whitstable*, anciently known as *Northwood*, a subinfeudation of the barony of *Chilham*, belonged to *Odo*, Bishop of *Bayeux*, and was afterwards granted to his tenant *Fulbert*, who took the name of *De Dover*. It descended by marriage to *John*, Earl of *Athol*, whose widow *Isabel* carried it to *Alexander de Baliol*, who held it by courtesy during his life.

In the 7 Edw. 1 *Baliol* claimed, in right of his wife, to have "without charter, of old custom in his manor in the county, to wit, at *Whitstable*, a Free Hundred Court, &c., wreck of the sea, toll, and warren, and alleged that all the ancestors of the same *Isabel*, from time whereof, &c., is not, have fully used all these liberties." On this claim judgment was given by the Justices in *eyre* in favour of the claimant.

In the 21 Edw. 1 there was a *quo warranto* against *Baliol*, who claimed the rights already stated, and "free warren and wreck of the sea, and toll with merchandise at *Le Craston* (1), in the same manor;" as from time whereof, &c. "And in the aforesaid manor warren, and wreck, and toll without interruption." The jurors found that *Baliol*, &c., "have always from time whereof memory is not, had all the liberties aforesaid as they claimed to have the same, except free warren in the lands newly acquired," &c.

The manor afterwards escheated to the Crown, and was granted, in the 5 Edw. 2, to *Bartholomew de Badlesmere* and *Margaret* his wife, with all liberties and free customs to the same appertaining. The manor became forfeited by attainder, and was then granted to *David*, Earl of *Athol*, for life.

In the 19 Edw. 2 a commission was issued by the King, the object of which was to prevent letters of a dangerous or suspicious character being introduced into the kingdom along the coast; and the commission recited that such had been introduced along the coast of the *Thames*, "between *Reculver*, *Greystone*, and *Whitstable*." The Commissioners were directed to guard the coast between the aforesaid *vills*, and *Thomas Doddes* was especially appointed for this purpose, to examine the places between "the *vills* of *Whitstable* and *Faversham*."

(1) Supposed to be what is now called *Greystone*.

In the 20 Edw. 2 a proclamation on the same subject was addressed to *Ralph Basset*, the constable of *Dover* and warden of the *Cinque Ports*, directing him to prevent such practices "in all *the ports aforesaid* and *other places where vessels* arrive." A writ in the same form was directed to Commissioners, to search along the coast of the *Thames*, between *Reculver*, *Greystone*, and *Whitstable*.

The college of *Plecy*, in *Essex*, afterwards obtained the manor of *Whitstable;* and, during the tenancy of this religious house, a dispute arose between the house and the tenants and inhabitants of *Milton-near-Sittingbourne*, as to the dredging of oysters within the ground, stream and shallow called the *Grace*, within the manor of *Whitstable*, and the ground in dispute was declared to be parcel of the manor of *Whitstable*.

In a rental of the manor made in the 22 Hen. 8, the banks of the *Street* and the *Regge*, on the east and north of the anchorage-ground, were included.

The estate of the college of *Plecy* reverted to the Crown on the dissolution of the monasteries; and the manor of *Whitstable* was, in the 38 Hen. 8, granted to *John Gates*. In the enumeration of matters granted were "fairs, markets, tolls, customs, free warrens, and all other rights, jurisdictions, franchises, liberties, privileges, profits, commodities, emoluments, and hereditaments whatsoever, as well spiritual as temporal, of whatsoever kind, nature, or species they may be, or by whatever name they are reputed or known, situate, lying, and being in, &c., in our county of *Essex*, and in *Whitstable* and *Buckenfield*, in our county of *Kent*."

Sir *John Gates* was attainted in the 1st Mary, and his possessions escheated to the Crown. A return to the Exchequer declared the manor of *Whitstable*, with all marshes, fisheries, royalties, and other appurtenances to be then in lease to *William Selhurst*.

In 3 Phillip & Mary the manor was granted to *Anne*, Duchess of *Somerset*, for life, with all marshes, waters, fishings, rights, franchises, &c.

In 7 Eliz. a commission was issued to Sir *Thomas Cotton* and others to inquire into matters "touching the port of *Sandwiche*, in the county of *Kent*, and the creeks belonging to the same port. The articles of inquiry were, whether the said port be frequented by merchants, and whether it be meet to be continued for the

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same purpose; whether it was decayed, what customhouse belonged to it; what numbers of creeks do belong to the port, and how far each is distant from the same; and into what shires every of the said creeks do extend; which creek was the most frequented; which the most decayed; what custom-house belonged to every creek, and who are the owners of the inheritance thereof; where each custom-house was; in what creek the customs had a deputy; what were the places in each creek where merchandise was discharged. The return to this commission stated, among other things, the creeks belonging to *Sandwich*, and among the rest mentioned "*Whitstable*, x. miles distant from the said port towards the north," and some others; "all which small creeks have no officer, but only at *Margate*, and he a searcher's deputy." The return went on to say, "All the creeks above named, other than such as have officers attendant, do sometime receive in and deliver out wares and merchandise, but none meet to have continuance, but only the said port of *Sandwich*, and the creeks of *Dover*, *Faversham*, *Milton*, and *Rochester*.

In the 16 Eliz. the Queen granted the reversion of the manor of *Whitstable*, after the death of the Duchess of *Somerset*, to *T. Heneage*, *Moyle Finch*, and *M. Heneage*, in fee, with all "fairs, markets, wrecks of the sea, tolls, customs, and all other liberties, franchises, &c., to the manor, rectory, and other the premises by these presents granted, or to any of them belonging." *T. Heneage* became the sole proprietor, and in the 23 Eliz. alienated the manor to *Thomas Smith*, whose descendant became Viscount *Strangford*, and by conveyances afterwards executed, it came into the possession of Lord *Bolingbroke*, who, on the 13th of November, 1775, executed a deputation to his water bailiff, *James Rowden*, "for me, and in my name, to ask, and demand to receive, of all masters of vessels who shall anchor within my said manor, tonnage," &c., at the rate of 1*s.* for every vessel under 100 tons, and after that rate for every vessel of a larger burden, "and to sue and arrest all and every person and persons whatsoever who shall take any ballace, stones, gravel, or sand from off the sea-beach or coast, or from off any other part of my manor, and to execute all other acts and things appertaining to the duty and office of a water bailiff of the manor and royalty aforesaid."

By indentures of lease and release in October, 1791, the manor of *Whitstable*, and "all and singular the rights, royalties, privileges, members and appurtenances," were conveyed to *Edward Foad* and *Thomas Smith*, and subsequently, by lease and release in 1792, to *Thomas Foord*, the deeds expressly mentioning anchorage dues. *Foord* executed a deputation to his water-bailiff, authorizing him to collect anchorage dues. The 33 Geo. 3, c. xlii., was passed to incorporate the Free Fishers and Dredgers of *Whitstable*, and to enable them to purchase the manor from *Thomas Foord*. In June, 1795, the manor was conveyed to them by deeds of lease and release, in which the right to anchorage dues was expressly mentioned, and since then they have constantly received anchorage upon all vessels casting anchor within the limits of the anchorage-ground within the manor and boundaries already described.

It was agreed that the Judges were to be at liberty to draw inferences of fact from the circumstances above stated. In July, 1867, the Court of Common Pleas gave judgment in favour of the Plaintiffs (1); and this judgment was (*diss.* Mr. Baron *Martin* and Mr. Baron *Bramwell*) affirmed in the Exchequer Chamber (2).

The case was then brought up to this House on Error.

The Judges were summoned, and Mr. Justice *Blackburn*, Mr. Justice *Keating*, Mr. Justice *Mellor*, Mr. Baron *Cleasby*, and Mr. Justice *Brett*, attended.

Mr. *Prentice*, Q.C., and Mr. *F. M. White*, for the Plaintiff in Error, the Defendant below:—

The first principle that must govern the consideration of this case is that which was declared in *Gann* v. *The Free Fishers of Whitstable* (3), namely, that the right to navigate freely is the inalienable right of all the subjects of the realm (4). In that case the mere use of the soil by casting an anchor in it was held not to give its owner any title to demand an anchorage toll. The ground of

(1) Law Rep. 2 C. P. 688.
(2) Ibid. 3 C. P. 578.
(3) 11 H. L. C. 192.
(4) "The bed of all tidal navigable rivers and of all arms of the sea is in the Crown, but is so for the benefit of the subjects. The right of navigation belongs, by law, to all the subjects of the realm, and the right to anchor as a necessary part of the right to navigate. This right never could have been interfered with by grant from the Crown."

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claim is now changed; it is asserted that this is a port or part of a port, and that on that account the Plaintiffs were entitled to claim anchorage toll for vessels using it. No such claim can be made except for consideration given, and given to those from whom the toll is demanded: *Brett* v. *Beales* (1); *Hill* v. *Smith* (2); *Lord Falmouth* v. *George* (3). This is, in fact, a demand of toll thorough, and must, therefore, have a lawful consideration to support it: *The Burgesses of Nottingham* v. *Lambert* (4); *Brett* v. *Beales* (1); *Hill* v. *Smith* (2); *James* v. *Johnson* (5); *Warren* v. *Prideaux* (6). A mere custom to pay, however long continued, will not sustain a claim of a legal right to demand payment: *Haspurt* v. *Wills* (7).

Mere damage done to the oyster-bed by anchoring does not give a right to toll, though it might possibly form ground for a claim to compensation (8). Besides, that is not the claim made here. The case which seems unfavourable to the Defendant is that of *Lord Falmouth* v. *George* (3); but it is only so in appearance, for there a consideration was really given for the toll—a capstan was kept to assist boats in landing, and in stormy weather its use was indispensable for that purpose; it was not always required in fine weather, but that could not affect its real value or usefulness.

Here the claim and the evidence are not consistent with each other. The claim is for a toll of 1*s.* upon every vessel anchoring within the limits of the alleged port. A part of the evidence is that of the deputation by Lord *Bolingbroke;* but that is for the demand of 1*s.* for every vessel anchoring there of less than 100 tons burden, and after that rate for every vessel of a larger burden—which shews that there was no settled legal toll, but only a claim to take a variable sum of money if the owners of vessels were willing to pay it.

(1) 10 B. & C. 508.
(2) 4 Taunt. 520.
(3) 5 Bing. 286.
(4) Willes, 111; Com. Dig. Toll, C.; Bacon, Abr. Custom, D.
(5) 2 Mod. 143.
(6) 1 Mod. 104.
(7) 1 Mod. 47.
(8) See *Post* v. *Munn*, 1 South's (*New Jersey*) Rep. 61; and the *Mayor of Colchester* v. *Brook*, 7 Q. B. 339, referred to in 11 H. L. C. 201. See also Lord *Wensleydale's* judgment, Ibid. 214; and Lord *Chelmsford's* judgment, Ibid. 218, 221.

Whitstable is not a port (1); it does not come within the definition in *Molloy* (2); nor is it a member or limb of a port. It is not mentioned, even as a limb of a port, in *Hale, De Portibus Maris* (3), or in *Jeake's* History of the *Cinque Ports* (4), where lists of the ports and their members and limbs are given. The facts here only establish that this is an open roadstead with small banks thrown up by the sea, which make certain channels where small vessels may anchor, but there is no evidence which justifies the calling of the place a port, or which shews that the Plaintiffs do anything that can form a good legal consideration for the imposition of a toll on all vessels that cast anchor within the limits of the manor. But even if it is a port for the purpose of landing goods, that will not establish a claim for anchorage dues against vessels which never enter the port to land goods there.

A legal origin must be shewn for the toll. None is shewn here. There is but one way to establish its creation, that is, by charter from the Crown. No such charter is produced. The usage to claim it beyond the time of living memory is not sufficient. If it is to depend on prescription, that creation must go back beyond the time of *Richard* I. But 1*s.* then would be equal to £2 now, and no such toll could have existed at that day—it would have been unreasonable and void. To be valid, it must be reasonable: *Heddy* v. *Wheelhouse* (5); *Chitty* on Prerogative (6); *Comyn's* Digest (7). Here no advantages are secured to those whose vessels enter *Whitstable.* Buoys were put in 1772, but at that time the Plaintiffs were not the owners of the soil, and the buoys were only exhibited to point out the places where vessels might anchor without injury to the oyster-beds. These buoys were, therefore, put down, not for the safety of the navigation, but for the protection of the property of the Plaintiffs. *The Mayor of Colchester* v. *Brooke* (8) shews that injury occasioned to these oyster-beds in the ordinary course of navi-

(1) See *Stockton and Darlington Railway* v. *Barratt*, 2 Man. & G. 155, *n.*; 11 Cl. & F. 590.

(2) Book 2, c. 14, s. 8: "Ports are those places to which the officers of the customs are appropriated."

(3) Part 2, c. 2; Harg. Law Tracts, p. 48.

(4) Page 120.

(5) Cro. Eliz. 558; Moore, 474.

(6) Page 195.

(7) Market F. 1; 2 Inst. 220.

(8) 7 Q. B. 339.

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gation, and without negligence, would not give a right to compensation. Then, again, it is said here that the buoys and stakes shew a channel where small vessels may anchor with safety, but here the toll is demanded in respect of all vessels whatever, whether they anchor in that channel or not. The observations of Mr. Baron *Bramwell* in the Court below, shewing that this is not a port properly so called, and that the alleged toll never could have existed in the time of *Richard* I., and, as so claimed, is unreasonable, are quite conclusive on the subject.

Mr. *Denman*, Q.C., and Mr. *Mellish*, Q.C. (Mr. *Raymond* was with him), for the Defendants in Error, the Plaintiffs below:—

This case is really decided by the principles laid down in *Bryant* v. *Foot* (1), and *Lawrence* v. *Hitch* (2). In the latter of these cases, which related to goods brought into the market of *Cheltenham*, a toll of this very amount was declared to have been reasonable, even supposing its origin to have been before the time of *Richard* I., but that a lawful origin of such a toll might be presumed within legal memory, by means of a dedication of streets to the use of the public, and a contemporaneous reservation of the toll on the part of the Crown. As to the unreasonableness of such a toll on account of the value of money in very early times, it is shewn in *Hallam* (3) that nothing can be more doubtful than any arguments on that subject drawn from the price of provisions at different epochs of our history.

Whitstable is a port, or a limb of the port of *Sandwich*, and if so, the decision in this case in the Court below can be sustained without in the least degree conflicting, nay, being in actual accordance with that of *Gann* v. *The Free Fishers of Whitstable* (4). It is named in *Molloy* (5), as one of the creeks of a limb of *Sandwich*. The ground is convenient and safe for vessels to anchor there, and whether it is so entirely or only partially through the labour of the proprietor, can make no difference in the matter. Here buoys and beacons have been put down, and that cannot be done but by the authority of the Crown: *Blackstone* (6); an authority which the

(1) Law Rep. 3 Q. B. 497.
(2) Ibid. 521.
(3) Middle Ages, vol. iii. ch. 9, pt. 2.
(4) 11 H. L. C. 192.
(5) Book 2, c. 14, s. 9, p. 334.
(6) Comm. book 1, c. 7, p. 264.

Crown may delegate to a subject. Where the Crown has created a port the right to anchorage dues there would, in a grant, pass by the word "*consuetudines*" (1), and the grant of the reversion of the manor after the death of the Duchess of *Somerset* contains words amply sufficient to pass the right to toll, and the use of these words of grant was repeated in all the subsequent conveyances. That they were acted on is shewn by the deputations issued by Lord *Bolingbroke*, and after him by *Foord*, and the Act of Parliament allows the company, thereby incorporated, to purchase the manor, with all its rights, royalties, and forfeitures. Among these must be included the right to take anchorage dues for anchoring within the port.

The cases referred to on the other side do not affect the present. The *Burgesses of Nottingham* v. *Lambert* (2), only declared that there must be consideration for a toll thorough, and the Court thought that no sufficient consideration was shewn in that case. It is not the actual repair and sustentation of the port that must be shewn, in order to justify the toll, the legal liability to repair and sustain it is sufficient: *Vinkerstone* v *Ebden* (3). Nor is it necessary that the vessel called on to pay the toll should actually have used the conveniences afforded: *Lord Falmouth* v. *George* (4), *Jenkins* v. *Harvey* (5), and this was expressed in the strongest manner in *The Mayor of Yarmouth* v. *Eaton* (6), where it was distinctly stated that the making of a port was itself a consideration. In *The Mayor of Exeter* v. *Warren* (7) it was also held that the Crown could create a port and assign its limits, though the soil was in a subject, and that such creation was a good consideration for the receipt of petty customs and port dues, and that in ancient times they might be granted away by the Crown. That disposes of the case of the *Burgesses of Nottingham* v. *Lambert* (2), so far as it is applicable here; and as to *Brett* v. *Beales* (8), the consideration there said to be given was in fact insufficient; but *Hill* v. *Smith* (9) shews that if the consideration in fact existed,

(1) Hale, Customs, pl. 3, c. 4; Harg. Tr. p. 132.
(2) Willes, 111.
(3) 1 Salk. 248; 1 Ld. Raym. 384.
(4) 5 Bing. 286.
(5) 1 C. M. & R. 877; 2 Ibid. 393; 1 Gale, 23.
(6) 3 Burr. 1402.
(7) 5 Q. B. 773.
(8) 10 B. & C. 508.
(9) 4 Taunt. 520.

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toll might be taken from a particular person, though he individually did not avail himself of the benefit which constituted it; and *Lord Falmouth* v. *George* (1), established the same point. The case of the *London Wharfs* (2) shews that the King alone can appoint ports. Here the evidence and the length of time during which the tolls have been received shew that he must have appointed this place as a port, and has since used his prerogative in making it the matter of grant to a subject. The words of grant here, as set forth in the various documents before the House, are sufficient, being much more explicit than they were in *Heddy* v *Wheelhouse* (3).

It is admitted that the toll must be reasonable, and it is submitted that it is so here.

Mr. *Prentice*, in reply:—

Every one of the cases is in accord with the doctrine that the mere fact of receiving anchorage dues is not sufficient to establish the right to take them. There must be a good consideration for them. There is no such consideration here. *The Mayor of Yarmouth* v. *Eaton* (4) declared that the creation of a port was itself a sufficient consideration for port dues. No doubt; but here there is no evidence of the creation of a port, and therefore *Vinkerstone* v. *Ebden* (5) does not apply. Nor does *Jenkins* v. *Harvey* (6), where Mr. Baron *Parke*, in his judgment, said (7), "here the right of the corporation to toll is not merely the consideration of the use of the port, but also of the obligation to repair and cleanse it, and the additional obligations, not merely to provide measures, but also a competent person to perform the duty of measuring faithfully and justly, if required to do so." Nothing of that sort can be alleged in this case; there is no obligation to do anything, and nothing has been done. Whatever there is of the character of a port is attributable to natural causes only; no lights are maintained by the Plaintiffs, and what buoys are put down, are so put down, not for the benefit of navigation, but for the protection of the Plaintiffs'

(1) 5 Bing. 286.
(2) 1 Sir W. Bl. 581.
(3) Cro. Eliz. 558.
(4) 3 Burr. 1402.
(5) 1 Salk. 248; 1 Ld. Raym. 384.
(6) 1 C. M. & R. 877; 2 Ibid. 393; 1 Gale, 23.
(7) 2 C. M. & R. 405

own property. All that was done in the way of issuing deputations to collect dues appeared to have been done without legal authority, and though it passed unchallenged because no one put himself forward to protect public rights, it could not found any legal title to claim the dues now demanded.

THE LORD CHANCELLOR proposed the following question for the consideration of the Judges :—

Whether, under the circumstances stated in the special case, a toll is payable in respect of a vessel brought up and anchoring in the same manner as the *Sancho Panza?*

The Judges retired to consider the question. On their return, Mr. Justice *Blackburn*, in their name, said, "We are satisfied that there is evidence in the present case of the existence of a port, and so answer your Lordships' question in the affirmative."

THE LORD CHANCELLOR (Lord *Hatherley*) :—

My Lords, I should propose to your Lordships in this case, in conformity with the opinion of Her Majesty's Judges (to whose assistance we are much indebted) to affirm the judgment of the Exchequer Chamber, and to dismiss the appeal with costs.

The case is reduced to a very narrow compass, owing to the investigation that it has received in the previous stages of the present litigation, and in the appeal of *Gann* against the same Respondents, heard by your Lordships in the year 1864 (1).

In the present, as in the previous case, the Respondents brought their action for the recovery of dues at the rate of 1*s.* per vessel in respect of anchorage, the vessel being brought up and anchored at *Whitstable.*

In the former case the demand was supported by proof of payments made to the Respondents from the year 1775 downwards, in respect of every vessel casting anchor within a part of the manor of *Whitstable,* of which the Plaintiffs there were owners, but they claimed this payment solely as a customary payment for the use of the soil. The House determined that such a claim could not be sustained. Their Lordships, who were then present, were of

(1) *Gann* v. *The Free Fishers of Whitstable*, 11 H. L. C. 192.

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opinion that such a claim, however ancient the actual recepit may have been, could not be sustained, founded, as it was, solely on the ownership of the soil. For the right of free passage and the user of the sea as a highway, including the right of anchorage, could not be interfered with either by the Crown, as owner of a manor, or by a subject to whom such ownership had been transferred. It was held, to use the words of the then Lord Chancellor, Lord *Westbury*, "that some facts must be shewn which either prove, or from which it can be inferred, that the soil claimed by the Respondents was originally within the precincts of a port or harbour; or that some service or aid to navigation was rendered to the public in respect of which the alleged grant was made." The other Lords present, including one of your Lordships, concurred in this view; Lord *Wensleydale* expressing his regret that the case was left bare of evidence as to whether or not the place of anchorage was a port. My noble and learned friend now present (Lord *Chelmsford*), admitted that every intendment should be made in favour of a payment uninterruptedly received time out of mind, if it was capable presumably of a lawful origin, but added that none had been presented in evidence there.

In the case now before us the facts are much more fully disclosed by the special case in which judgment has been given for the Respondents. The 6th paragraph of that case states the immemorial receipt of the toll claimed from every vessel casting anchor within the limits of the anchorage ground in the possession of the Respondents, whether the anchoring was voluntary or of necessity.

Is there, then, also a legal origin disclosed for it in the case, from the statements contained in which we are at liberty to draw inferences of fact. Two suggestions have been made of such legal origin: the one, a supply of buoys and beacons by the Respondents; the other, the fact of the *locus in quo* being part of a port.

The authority of Lord *Hale*, in his Treatise, as cited in the former and in the present case, is, I think, sufficient to establish the conclusion of law—that if the *locus in quo* is part of a port, a presumable legal origin for the toll is established. The duty of anchorage is stated by him to be "almost incident to every owner-

ship of a port." He adds that this *primâ facie* arises from the property in the soil, but not necessarily, and may be the consequence of the franchise. If, then, we find the soil, which is in the Respondents, to be part of a port, the immemorial payment may be referred to the ownership of the franchise, independently of the period at which they may have acquired the ownership of the soil.

I pass by the question of the buoys and beacons, and I proceed to consider what evidence is contained in the special case of the existence of a port. It was said that there are no artificial works, but that the natural configuration of the place alone forms the port, if such port can be said to exist.

I do not think that this would have any effect as regards the law. However commodious a place may be for vessels, it will not therefore become a port, the establishment of which must be by authority of the Crown. But if the Crown do so establish a port, with a suitable landing-place, whether the port be naturally or artificially formed, and if vessels avail themselves of that port to cast anchor there, I apprehend a sufficient consideration for the anchorage dues arises.

Now it appears by the 23rd and 24th paragraphs of the special case, that in the 21st year of the reign of *Edward* I., *Alexander De Baliol*, then lord of the manor, claimed to have, and the jury found that he and his ancestors, from time whereof memory is not, had, amongst other things, "wreck of the sea and toll with merchandize at *Le Craston* in the same manor." This toll was not an anchorage toll, but it tends to shew that merchandize was at that early period landed within the limits of the manor.

In the 19 Edw. 2, a commission was issued for making search as to letters from foreign ports supposed to be brought by persons landing between *Reculver*, *Greystone*, and *Whitstable;* and search was directed in all places where ships ply by the coast between the said *vills*.

In the 20 Edw. 2, a proclamation was issued, addressed to the Warden of the *Cinque Ports* against certain merchants coming with treasonable letters under colour of grants of safe conduct, and he was directed to prohibit such a practice in all the ports aforesaid, and other places where vessels arrive, and to make

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search in the aforesaid ports and places. A writ is then directed to the Commissioners searching along the coast between *Reculver*, *Greystone*, and *Whitstable*, who are not to cease their search on account of any letters of safe conduct.

In the 9 Eliz., a special commission was issued to inquire into the port of *Sandwich* and the creeks belonging to the same. Amongst the creeks of the port in the certificate of the commission is mentioned *Whitstable*, as a small creek having no officer, but only at *Margate*, and he a searcher's deputy.

All, or nearly all, the grants of the manor contain a reference to "tolls" in the general words, as well as to wreck of the sea. The payment is found to be immemorial. There is evidence of traffic in respect of tolls of merchandize being taken; there is evidence of the spot being treated as a creek of the *Cinque Ports*, the ground itself in its configuration is favourable to the formation of a port, and I conceive that your Lordships are justified in drawing the inference of fact that a port did exist, and that therefore the toll had a legal origin, and that the judgment of the Court of Exchequer Chamber is correct.

LORD CHELMSFORD:—

My Lords, in considering this case, it is necessary in the outset to distinguish it from the decision of this House in the case of *Gann* v. *The Free Fishers of Whitstable* (1). In that case the anchorage toll now in question was claimed upon the ground of the Defendant's vessel having cast anchor within the limits of the Plaintiffs' free fishery in *Whitstable Bay*. In the Plaintiffs' documents of title to the anchorage toll it was described as "a customary payment usually and of right made to the lord of the manor of *Whitstable* for, or on account of, the anchorage of any ship or vessel within the said manor." The jury found that from 1775 downwards the Plaintiffs, and those under whom they derived title, had, from time to time, claimed as of right to take, and had taken, the sum of 1s. from vessels casting anchor within that portion of the manor on which the Defendant's vessel had cast anchor, and that they claimed to take it as a customary payment for such use of the soil. From the receipt of the toll from a

(1) 11 H. L. C. 192.

period beyond the time of living memory the jury might have been directed to presume that it had been immemorially taken; but their finding was limited to the actual taking of the toll from the year 1775 down to the time of their verdict.

Upon the argument of the appeal, however, it was admitted by the Appellant that the anchorage toll had been paid to the lords of the manor of *Whitstable* from time immemorial; and in delivering my opinion to the House, I stated (as mentioned by my noble and learned friend on the woolsack) "that every intendment ought to be made in favour of a payment which has been uninterruptedly received time out of mind, supposing it presumably capable of a lawful origin." But all presumption was excluded in that case by the express statement of the nature of the Plaintiffs' claim, which was of an anchorage toll payable to the lord of the manor for the anchorage of any ship or vessel within the manor, and (as the jury found) "as a customary payment for the use of the soil."

Now the right of the public freely to navigate the high seas is a paramount right, to which the right of the Crown in the soil is necessarily subservient; and, therefore, as the right of navigation must include the right of anchoring, the House held that the Crown, or its grantee, could not impose a toll upon this use of their soil without some additional consideration; and upon this state of the facts decided against the claim of the Plaintiffs to take the anchorage toll.

In the present case the facts and circumstances are more fully stated, and the title to the anchorage toll is carried back to a very remote period. The right to recover this toll is not placed upon any particular ground, but depends upon all the statements in the special case, from which your Lordships are at liberty to draw any inference of fact. It is stated in the special case that "the Plaintiffs, and those under whom they claim, have from time immemorial, continually down to the present time, taken the sum of 1s. from every vessel casting anchor within the limits of the anchorage-ground now in their possession, whether the anchoring were voluntary or from necessity."

Under these circumstances, as suggested by Lord *Wensleydale*, in the case of *Gann* v. *The Free Fishers of Whitstable* (1), "it will

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be our duty, if the case admits of it, to find a legal origin for a right so long enjoyed."

The right of anchorage is usually, if not universally, incident to the proprietorship of a port: *Hale, De Portibus Maris,* chap. 6, in describing the several port duties which arise from the *jus dominii* of property or franchise in port, says: "These are of two kinds, and as to the former, viz., such as are common and ordinary, and so almost incident to every ownership of a port," he mentions, first, "anchorage, or a prestation or toll for every anchor cast there, and sometimes though there be no anchor;" and he adds, "this doth in truth properly and *primâ facie* arise from or in respect of the propriety of the soil, and is an evidence of it. But yet it is not so always, but grows due in respect of the franchise."

Now, if the existence of a port is necessary to render an anchorage toll legal, and as Lord *Hale* says, "Common and ordinary tolls" (of which he states anchorage to be one) "are almost incident to every ownership of a port," ought we not, from the immemorial taking of the anchorage toll at *Whitstable,* to presume that the lords of the manor had a port there, even if there were no fact in the case to prove the actual existence of one?

It is admitted by the learned counsel for the Appellant that a port of a certain kind existed at *Whitstable* from an early period, but that it was merely a port for the lading and unlading of goods and merchandises, which he contended would not give any right to an anchorage toll. The existence of this description of port he considers to be proved by the finding of the jury upon the *quo warranto* against *Alexander Baliol* in the 21 Edw. 1, that amongst the liberties which he had in the manor of *Whitstable* was "toll with merchandize." But he argued that this was not such a port as would give a right to an anchorage toll. If this is correct, then, as anchorage toll was at this very time, and had for many years before, been paid to the lords of the manor of *Whitstable,* we must presume a legal origin for the payment arising from the existence of some other port, which would carry the anchorage toll with it as its incident.

But I entertain no doubt that the Crown might have created a port for the lading and unlading of goods, for which it would be necessary that the grantee should erect wharves and landing-

places, and in respect thereof might have granted toll not only upon goods brought into the port, but also for anchorage upon vessels casting anchor within the port. I find nothing in the authorities to warrant the argument of the learned counsel that the benefit conferred by the owner of the port must be precisely that in respect of which the toll is demanded. On the contrary, it appears from Lord *Hale, De Portibus Maris*, chap. 6, that, "though *A.* may have the property of a creek, or harbour, or navigable river, yet the King may grant there the liberty of a port to *B.*, and so the interest of property and the interest of franchise be several and divided." And he afterwards mentions anchorage as a toll arising from the *jus dominii* or franchise of a port. In this case it is clear that the anchorage toll would not be payable in respect of any benefit which the anchoring vessel derived from the owner of the franchise.

It was also argued for the Appellant that toll could not be demandable for the use of the port of *Whitstable* as a place of anchorage, because it was not artifically formed, but was a natural roadstead, and therefore no obligation was laid upon the owner of the port to repair it and keep it accessible, so as to form a consideration for the anchorage toll. This is only another form of the argument that an anchorage toll can only be due in respect of the specific benefit to vessels which the name imports. But that the repair of a port is not the necessary consideration for an anchorage toll appears from what has been already cited from Lord *Hale*, that the franchise of a port may be in one person and the ownership of the soil within the limits of the port in another. In truth, the port which is admitted to have existed at *Whitstable* comes precisely within the definition of a port given by Lord *Hale*, viz., a place for the lading and unlading of ships or vessels, erected by charter of the King or a lawful prescription. And he says, in the 2nd chapter of his *De Portibus Maris*, "A port is *quid aggregatum*, consisting of somewhat that is natural, viz., an access of the sea, whereby ships may conveniently come, safe situation against winds where they may safely lie, and a good shore where they may well unlade; something that is artificial, as quays and wharfs, and cranes and warehouses, and houses of common receipt, and something that is civil, viz., privileges and franchises, viz., *jus ap-*

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plicandi, jus mercati, and divers other additaments given to it by civil authority."

That both a toll upon merchandize, and also an anchorage toll, were taken by the lords of the manor of *Whitstable* is clear, when we come to modern times.

In the deeds of conveyance of the fishery, and also in the Act for incorporating the Free Fishers, the payment and dues for the anchorage of any ships or vessels (in the Act, the words are " for or on account of any ship or vessel ") are distinguished from the payments or dues for the landing of any goods or merchandise; shewing that these two description of toll belonged, separately and distinctly, to the lord of the manor.

With respect to the anchorage toll, it was observed, that the deputation of Lord *Bolingbroke* to his water-bailiff in 1775, was to receive 1*s.* tonnage for every vessel under 100 tons, and after that rate for every vessel of a larger burden, which is inconsistent with the claim now made of 1*s.* for every vessel. But it must be remembered that this is an authority to collect a toll which has been paid from time immemorial. And if there was any mistake in the description of the toll to be demanded, it is an admitted fact that the sum of 1*s.* from every vessel was always the amount received.

The whole case really turns upon the fact stated in the special case, " that the Plaintiffs, and those under whom they claim, have from time immemorial continually, down to the present time, taken the sum of 1*s.* from every vessel casting anchor within the limits of the anchorage ground now in their possession, whether the anchoring were voluntary or from necessity." Unless anything appears to the contrary, we are bound to presume that this immemorial payment had a lawful commencement. There is nothing in this case, as there was in the case of *Gann* v. *The Free Fishers of Whitstable* (1), to compel us to assign a different foundation for the anchorage toll than the existence of a port in respect of which the toll was demanded and paid.

If the documents do not prove the existence of a port, they are at least, not inconsistent with one, and even without the liberty given to the Judges in the Exchequer Chamber to draw any inference of fact from the statements in the special case, I think,

(1) 11 H. L. C. 192.

from the immemorial payment of the anchorage toll, they were bound to presume that the lords of the manor of *Whitstable* were the owners of a port to which such a toll would be lawfully incident.

I am of opinion that the judgment of the Court of Exchequer Chamber ought to be affirmed.

LORD COLONSAY:—

My Lords, I entirely concur in the judgment proposed by my noble and learned friend on the woolsack. I do not consider that the present judgment at all differs from that which was given in the case of *Gann* v. *The Free Fishers of Whitstable* (1); the claim in that case was put upon a totally different ground.

Judgment affirmed, appeal dismissed.

Lords' Journals, 13th July, 1869.

Attorney for the Plaintiff in Error: *J. Towne, Margate.*
Attorneys for Defendants in Error: *Nethersole & Speechley.*

(1) 11 H. L. C. 192.

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MASSY AND ANOTHER . . . . . APPELLANTS;

AND

ROWEN, *et al.* . . . . . RESPONDENTS.

"Sole"—Will—Technical Words.

The word "sole," in a will, has not a fixed technical meaning, throwing on the person who contests that meaning the necessity of shewing, by implication, that it is not used in the particular instrument, in its strict technical sense.

In a marriage settlement it may, from the circumstances of the case, have a particular and exclusive meaning attached to it.

Ex parte Ray (1) and *Adamson* v. *Armitage* (2) explained; *Gilbert* v. *Lewis* (3) adopted.

It is not desirable to multiply words having the same technical meaning, by introducing one which never had such a meaning, where another already exists with that technical meaning already appropriated to it.

IN January, 1801, an agreement was made between *John Cook* and *Joseph Evans*, by which the former undertook to execute in favour of *Evans* a lease for 999 years, at a rent of six guineas a year, of certain premises in the county of *Tipperary*, known as "*Water's Lot.*" On the 15th of April, 1818, *Evans* made his will, reciting his title to these and other premises, and he devised them unto *James Roe* and *Hugh Baker*, and the survivor of them, his heirs, &c., upon trust to pay certain rents and annuities, and, subject thereto, the trustees were to stand "seised thereof, and of my several and respective estates and interest therein, in trust for the sole use of my daughter *Hannah Evans* and her assigns, subject, however, to the said annuities charged thereon." Then followed a direction that the executors were, within twelve months after the testator's decease, to pay over a sum of £2000 to the trustees to be invested by them, and the dividends and interest to be paid to a married daughter of the testator, *Bess Massy*, for her life, "her receipt to be a sufficient discharge for the same," and after her death to her children, and in default of children the same was to be paid, with all savings and interest, to *Hannah Evans*, her executors, administrators, or assigns. The testator then nominated three executors, of

(1) 1 Madd. 199. (2) 19 Ves. 416. (3) 1 De G. J. & S. 38.

whom his daughter *Hannah* was one, and appointed her his residuary legatee. In 1822, *Hannah Evans* married *Thomas Travers Adams*, but though a settlement was made on occasion of the marriage, *Water's Lot* was not included therein. *Joseph Evans* died in 1823, and *Adams*, the husband of *Hannah*, then applied for and obtained performance of the agreement of 1801, by the execution of a lease to himself in the terms of that agreement. *Adams*, being thus the legal owner of the premises, made his will in November, 1863, bequeathing them to the Respondents; he died in December, 1864. A commission of lunacy was afterwards taken out against Mrs. *Hannah Adams*, and Mr. *Massy*, the present Appellant, was appointed committee under it. The executors under *Adams'* will claimed from the tenants the rents of these premises, and in December, 1865, Mr. *Massy* filed a cause petition, praying that it might be declared that under the will of *Joseph Evans* the lease of *Water's Lot* was taken in trust for the separate use of *Hannah Evans* (Mrs. *Hannah Adams*), and that a conveyance thereof might be executed to himself as her committee.

The case was heard before Lord Chancellor *Brady*, who, in June, 1866, made a decree, granting the prayer of the cause petition, being of opinion that the word "sole," accompanied, as it was here, by the interposition of a trust in the gift to *Hannah Evans*, created in her a separate estate in the property. An appeal was brought against this decision, and was heard before Lord Chancellor *Blackburne* and Mr. Justice *Christian*, when the decree was reversed (1). This appeal was then brought.

Mr. *Joshua Williams*, Q.C., and Mr. *Robert Ferguson* (of the Irish Bar), for the Appellant:—

The words "sole" and "separate" are words of art, and when either of them is employed the result is the same, unless the plain intention expressed by it is contradicted in an equally plain manner by the general purpose of the will. It is admitted that the common form with conveyances is to employ both words, but either is really sufficient for the purpose. Both words mean free from the control of anybody else, and, as applied to a woman, "sole," must be equivalent to "separate." All the text books

(1) Law Rep. (Ir.) 1 Eq. 110.

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recognise the rule that a woman may have property independent of her husband's control. *Fonblanque* on Equity (1); *Roper* on Husband and Wife (2). *Hulme* v. *Tenant* (3) declares the principle. It is not necessary for such a purpose that a trust should be created. The interest will vest in her as much as if it had been vested in trustees for her separate use: *Rollfe* v. *Budder* (4). But here there was a trust. In *Adamson* v. *Armitage* (5) a bequest of a fund, with the interest thereon, to be vested in trustees, the income thereof to be for a woman's sole use and benefit, was held to vest the capital in her for her separate use. The Master of the Rolls (Sir *W. Grant*) there said: "I think the direction that it shall be for her *sole* use sufficient to vest the property in her, exclusive of marital right." In *Ex parte Ray* (6) a settlement gave property to trustees for the "own sole use, benefit, and disposition" of a lady, and that was held to give her a separate estate. Vice-Chancellor *Plumer* there said (7): "Taking the words 'sole use' by themselves, they must have the same meaning as 'separate use': omitting the word '*sole*,' the property would go to the husband, but I am not at liberty to reject that word. 'Sole' means solely hers—for her sole benefit. It is an emphatic and operative word." There is no doubt about the general doctrine stated by Lord Chancellor *Brougham* in *Tyler* v. *Lake* (8), that there must be a clear intention to exclude the marital right, but it is equally clear that the use of such an emphatic word as "sole" does express that intention. In *Ex parte Killick* (9) there was a gift to the testator's daughter of two houses, with all the furniture in one of them, "for her own sole use and benefit," and she was held entitled to this furniture as against the assignees of her husband, who had become bankrupt. So in *Davis* v. *Prout* (10), property was given in trust for the "sole and absolute use" of a female infant. She married while under age, and a settlement was made which gave half the property to the husband and half to the wife for her separate use. The doctrine of her exclusive right to that half was acknowledged in that case, and there was no trust created there. [THE LORD CHAN-

(1) Vol. i. p. 96, 108–110.
(2) Vol. ii. p. 157.
(3) 1 Bro. C. C. 16.
(4) Bunb. 187.
(5) 19 Ves. 416.
(6) 1 Madd. 199.
(7) Ibid. 207.
(8) 2 Russ. & My. 183.
(9) 3 M. D. & De G. 480.
(10) 7 Beav. 288.

CELLOR:—That case really was decided on defect of parties to the bill.] In *Lindsell* v. *Thacker* (1), even a trust estate vested in the husband, and given by him to his wife for her "absolute use for ever," was held to pass to the wife; but as there is some doubt about the correctness of the statement of the facts in that case, it is relied on not for the final decision, but for the words used by Vice-Chancellor *Shadwell* in giving judgment. His Honour said: "The words 'sole use' necessarily imply separate use." In *Inglefield* v. *Coghlan* (2), stock was directed to be sold, and the income was given to a woman for her "own use and benefit during her life." It was held that this gave her a life interest for her separate use. In *Green* v. *Marsden* (3) there was first a gift of freehold and leasehold houses to the wife for her "sole use and benefit," and then of money in the funds in the same way, begging her, in each instance, to give the same at her death to the husband's relatives and her own in such shares as she should think fit. It was held that no trust was created binding on her, and that the gifts to her were absolute. All these cases justify the argument for this Appellant. But then came the case of *Gilbert* v. *Lewis* (4). There Lord *Westbury* had held that such a gift did not create a separate estate, observing, "There is no case of a will containing a disposition to a woman, either single or becoming discovert immediately on the death of the testator, in which these simple words, unconnected with a gift to trustees, have been made the foundation of a decision that the devisee takes a separate estate;" and he says that there was nothing in that case such as marks a clear intention on the part of the testator to exclude the marital right. It is submitted that that holding is not in accordance with the spirit of the decisions already quoted; and farther, that there is a sufficient indication of the intention of the testator here to satisfy the doctrine laid down in *Tyler* v. *Lake* (5), and to shew that the testator intended that his daughter *Hannah* should have an exclusive title to this property. In *Gilbert* v. *Lewis* (4) the property was devised by the husband to his wife; it was property to which he had a reversionary interest only. She became possessed of it after his death, and then married a second time. It was claimed on behalf of her

(1) 12 Sim. 178.
(2) 2 Coll. 247.
(3) 1 Drew. 646.
(4) 1 De G. J. & S. 38.
(5) 2 Russ. & My. 183.

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second husband. The circumstances which indicate intention were not there so strong as they are here, where both parts of the will shew an undoubted intention on the part of the testator to make his daughter *Hannah* the absolute mistress of the property bequeathed to her. *Green* v. *Britten*, reported in the same volume (1), certainly does not support *Gilbert* v. *Lewis* (2). There a testator bequeathed his residuary personal estate, consisting partly of ships, to his sister (who was, and was stated in the will to be, a married woman), subject to certain legacies, and to certain directions given as to the management of the property. One of these directions was, that a person named in the will was to manage the property, and not to sell the ships within seven years, unless they caused a loss. By a codicil, the testator stated his wish that his sister should still have the residue, but declared that it should be invested as his executors should think fit, "in trust for her sole benefit during her lifetime." It was held that while the ships remained unsold the sister took the actual income for her separate use. That decision is in accordance with all the previous authorities. And since then it has been decided, in *Tarsey's Case* (3), that where a testator, who had in contemplation his niece's marriage, bequeathed to her the residue of his personal estate "for her own sole use and benefit absolutely," she was entitled to a separate estate. There the Vice-Chancellor said, that "where no meaning can be given to the word '*sole*,' except that the estate shall be held separately from the husband," such a meaning ought to be given to it. That observation exactly applies here. *Lewis* v. *Mathews* (4) does not support *Gilbert* v. *Lewis* (2), for there the word "*sole*" was made to apply not only to the lady herself, but to her executors, administrators, and assigns, to the latter of whom Vice-Chancellor *Kindersley* said it could not have been intended to give a separate estate. The case, however, does not impeach, but rather recognises, the principle now contended for, and proceeds on the peculiar words of that particular gift.

Sir *R. Palmer*, Q.C., and Mr. *Dumergue*, for the Respondents:—

The case of *Gilbert* v. *Lewis* (2), which decides that, in a will,

(1) 1 De G. J. & S. 649.
(2) Ibid. 38. 9 Jur. N.S. 187
(3) Law Rep. 1 Eq. 561.
(4) Ibid. 2 Eq. 177. 12 Jur. N.S. 342

"sole use" without more, cannot mean "separate use," absolutely disposes of the present. The trusts under this will were only introduced for the purpose of securing the property from alienation; the gift to the daughter is expressly subject to the payment of certain rents and annuities, and it is only after satisfying them that the trustees are to stand seised of the property "for the sole use of my daughter *Harriet Evans* and her assigns." There is not one word there which excludes the marital right, yet, according to the clearly-expressed rule stated by Lord Chancellor *Brougham* in *Tyler* v. *Lake* (1), a rule constantly quoted and acted upon, the marital right cannot be excluded except by the use of expressions clearly and sufficiently denoting such an intention.

The word "sole" is not, like "separate," a technical expression or term of art, having a particular meaning. Even in the cases cited on the other side the word "sole" only receives such a construction in a will when connected with other expressions which give a particular meaning to it, or when trustees are introduced to protect the interest of the woman, or when the word is employed in a marriage settlement, where, from the obvious necessity of the case, "sole" must have the meaning of "separate." In *Green* v. *Britten* (2) the lady was married at the time the will was made, and is so described in it; and the gift was "to her, her heirs, executors, administrators, and assigns absolutely and for ever." Her interest was in that way clearly and distinctly separated from that of her husband.

All the cases cited on the other side bear out the doctrine stated in *Gilbert* v. *Lewis* (3). There is, in all of them where *sole* was construed *separate*, the machinery to protect the interests of the married woman, or there was an express declaration of intention to exclude the husband, or there were the purposes of a settlement on marriage to be secured.

Mr. *Williams* replied.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, this case has been very fully and ably discussed, and the main question, as it appears to me, which presents itself for

(1) 2 Russ. & My. 183. (2) 1 De G. J. & S. 649.
(3) 1 De G. J. & S. 33.

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your Lordships' decision must really turn upon whether or not Mr. *Williams* has established his proposition on behalf of the Appellants, that the word "sole" has, *per se*, a technical signification, as the word "separate" confessedly has, and as the word "issue" also confessedly has. Let us take, in illustration of the argument here, the word "issue," which, as we all know, means the whole of the descendants of the *præpositus*. It is incumbent upon those who wish to limit it to children to point out something in the will or instrument which indicates an intention so to limit it. In like manner, if the word "sole" had had a technical signification, then it would have been incumbent upon those who resisted the contention of the Appellant to shew, by necessary implication, that it was used by the testator in a sense not technical. But now, after having heard all the authorities cited at your Lordships' Bar, and having certainly had previously, on more than one occasion, reason to consider this disputed question (for disputed it has been), which has been under the consideration of the profession, more particularly since the case of *Gilbert* v. *Lewis* (1), I certainly have arrived at the conclusion that the word "sole" is not a technical word—that is to say, not technical in this sense, as having a certain definite meaning affixed to it, which throws upon the person who contests that meaning the necessity of shewing by implication that it is not used in the particular instrument in question according to its strict and technical sense.

Now, Mr. *Williams* was obliged to commence with the observation that the common form used by all conveyancers with reference to a separate estate is to use the words "sole and separate use." That is the common form, which appears in all the books and precedents. The word "separate" is sometimes used alone; but if the word "sole" is used, it is never used alone, that I can find, in any book or precedent. Nor has it been attempted to be shewn in the present case, as it would have been competent to the parties to shew, according to the recognised doctrine in the case of *Ex parte Ray* (2), that the practice of conveyancers has been modelled according to a given construction of the word "sole." It would have been very easy, of course, to shew that, if such had been the case. But, on the contrary, I think we may infer, from

(1) 1 De G. J. & S. 38. (2) 1 Madd. 199.

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Mr. *Williams'* very proper and candid statement with regard to his own large experience, that he would never so use the word, and that it is not so used by conveyancers generally.

Now that being so, I think it goes a long way to shew that no technical sense has been imparted to this word; and though I may not altogether go so far as Sir *Roundell Palmer* did in his argument, in saying that no countenance has been given to such a notion, regard being had to some of the facts in the case of *Ex parte Killick* (1), yet I do not see any concurrence of decisions which obliges us to hold that the course of decision has stamped upon the word "sole" a fixed and technical meaning which must be escaped from by a person who wants to controvert it. I do not think any of the authorities at all go the length of saying that any technical meaning has been impressed upon the word. That being so, the case is reduced to a question of mere construction; and although, no doubt, it would be very desirable for all those engaged in the profession, if we were able at all times to eliminate from each case its own particular facts and circumstances, and to arrive at a decision upon a general principle, yet we cannot do so, for the rights and interests of parties, especially upon the construction of wills, must depend upon the meaning to be collected from the whole instrument taken together. And I cannot go farther, as far as regards my own opinion, in addressing your Lordships, than to recommend that we should affirm the proposition that the word "sole" has not *per se* a technical meaning.

The only authorities which require to be noticed upon this subject are, first, the case of *Adamson* v. *Armitage* (2), before Sir *William Grant*, which, regard being had to the character of that Judge, would be undoubtedly a case of very great authority, if we could find the principle clearly established in it, that the word "sole" of itself had the efficacy which has been attributed to it by the Appellants. But I think there are two circumstances which militate against that conclusion being drawn from the decision of Sir *William Grant*. The one is, that the question which really arose in that case was, whether a life interest or an absolute interest had been conferred. And there was there also an interposition of trustees with reference to the sole benefit of the person who was in-

(1) 3 M. D. & De G. 480. (2) 19 Ves. 416.

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tended to take. And, with reference to circumstances in that case which would seem in some respects to have created a life interest alone, except for other passages in the will, it became incumbent upon Sir *William Grant* to consider whether an interpretation might not properly be put on the word "sole," as there introduced, to this extent, that during the lifetime of the lady, in the case of any after-taken husband (she was not married at the time, but she might have married afterwards), the interest should be applied for his use, she having, nevertheless, a full and complete and beneficial ownership in the whole. Besides that, one cannot help feeling that the case is not to be regarded as a leading case impressing upon the word "sole" this technical meaning, because, in reading Sir *William Grant's* judgment, you see that in the conclusion to which he comes he relies upon the whole will, and upon the cases in which it had been held that words of such import as "payment for the wife's own use and benefit," or "payment to her own hands," had received the construction of creating a separate use—words which undoubtedly, since his day, have been held not to have any such effect properly attributable to them. I cannot, therefore, look upon that as a case which has settled and determined the law.

Then, with regard to other cases which have been cited, the case of *Ex parte Killick* (1) is, perhaps, the strongest; and I may therefore dismiss the others with the observation that that is the strongest. In that case, undoubtedly, the Vice-Chancellor, in deciding the case, did throw out some observations strongly tending in the direction contended for by Mr. *Williams;* but the character of the case itself is such that I think all Judges would have concurred in the conclusion which was arrived at, because the character of the limitations shewed the intention of excluding the husband from either portion of the property conveyed. When they came to deal with the furniture which was included in the house, which had been settled undeniably for the separate use of the lady, they used the expression "sole use and benefit;" and the conclusion to which the Vice-Chancellor came was, that there was one intent pervading the whole instrument, namely, the intent of excluding the husband's beneficial interest. I might refer to the case of *Green* v. *Britten* (2) before the Lords Justices; but that, again, is

(1) 3 M. D. & De G. 480. (2) 1 De G. J. & S. 649.

a case of a similar description, where the whole purport of the instrument clearly indicated a separation of the interest of the wife from the control and influence of the husband.

That being so, on the other hand, we have the cases of *Gilbert* v. *Lewis* (1) before Lord Chancellor *Westbury*, and of *Lewis* v. *Mathews* (2), before Vice-Chancellor *Kindersley*. And it appears to me that in those cases the learned Judges who decided them had not anything before them which ought to have embarrassed them in coming to the conclusion to which they did come, that the word "sole" was not a technical word. I have referred to the authorities which existed at the time when those decisions took place. Both of those learned Judges came to a conclusion which I think will warrant your Lordships in saying that if there is any weight to be given at all to the effect to be produced upon the minds of conveyancers and those who have to advise upon instruments of that kind, in consequence of a decision, the only effect would be this, that there is nothing anterior to those judgments which necessarily affixed a technical meaning to this word "sole" —and that those Judges, not being embarrassed with any such previous conclusion, have now sufficiently established the contrary proposition.

Therefore, both on grounds of policy, and with regard to abiding by decisions which may tend to guide others who have to advise upon questions of this description, the weight of authority is undoubtedly in favour of holding, as I advise your Lordships to decide in this case, that the word "sole" is not a technical word—but that we must look to the whole instrument to come to a conclusion upon its meaning. Of course it must have some meaning attributed to it—and, taking the word "sole," as applied to the case of a marriage settlement—to a case of contemplated devolution of property upon a married lady, at a time when she is about to put herself in such a position that, unless she be guarded and defended as to that which is her property, and under her own control and management, the husband will acquire together with her an interest in it—in all those cases the word "sole" finds its ready and appropriate meaning in its being a provision to secure the property against the control of the husband and to give to her the

(1) 1 De G. J. & S. 38. (2) Law Rep. 2 Eq. 177.

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sole and absolute disposition of it. On the other hand, there are cases which have been cited before us, in which you cannot conceive that the word "sole" is used in any such sense as that, but it appears to be used in a proper sense, namely, that the person to whom it is applied shall have an interest separate and apart from others—not necessarily from her husband, but from other persons of any kind whatever. One case of that description was a case where the question arose whether a trust estate had been devised to the sole use of a married lady. And another case of the same kind was a case where the question arose before Vice-Chancellor *Kindersley* as to whether a bequest of property to the sole use of a married lady, accompanied with a bequest to the sole use of her executors, administrators, and assigns, could be held to have a meaning isolating her from her husband—or whether it must be held to have a meaning isolating her from the rest of the world, and giving her the property as its sole and undisputed owner.

Now, in this case, when we came to this view—that the word "sole" is to be construed in connection with the whole meaning of the instrument, it appears to me to be sufficiently plain and apparent what the meaning is. The testator vests a mass of property in trustees, and directs those trustees to pay annuities to a very considerable amount. The annuitants who were to have the benefit of that instrument were the son of the testator and two of the testator's sisters. He endeavours to fetter his son in order to prevent his alienation, which I apprehend would be a futile endeavour if there had not been, as there is here, a gift over. There is a gift over to a person who may inherit his property, as he describes it, and then he says with respect to all that which remains after all those trusts have been fulfilled, the trustees "shall stand seised thereof, and of my several and respective estates and interest therein, in trust for the sole use of my daughter, *Hannah Evans*, and her assigns, subject however to the said annuities charged thereon." In other words, having dealt with his son and having dealt with his sisters out of this identical property, there will be a residue, and he says, my daughter shall have it "for her sole use." Besides that it appears that he contemplates an arrangement for his other daughter, who was married at the time of the making of the will. And this, again, is to be separate. *Hannah Evans* is the

favourite child, I suppose. I do not know the value of the property, but *Hannah* is to take this property for her sole use and for her assigns. I do not lay any stress upon that last phrase. I think it would be narrowing the construction too much to interpret the instrument as carrying on the word "sole" as applying to her assigns. I do not resort to such narrow criticism as that—but I take it on the broader ground that she is to have it for her sole use in the sense of being isolated from those I have named.

Now it is not unimportant to observe that the testator having two daughters, the one married, and the other unmarried, in dealing with the unmarried daughter he uses this word, which I should hold not to be *per se* sufficient to impose a technical meaning upon the language. Having dealt with her, he deals with the other daughter who was married, by using strict technical words, and declaring that her receipt alone should be a sufficient discharge. And having done that he proceeds to a provision with reference to the other daughter, and, finally, he makes this particular daughter, *Hannah Evans*, his residuary legatee, saying that all the residue shall be for her sole benefit. Here, again, I do not think that that would be an indication that the word "sole" was to have the peculiar sense attributed to it, merely because he has not used the same word in the latter part of this will as applied to the same person. I think, therefore, the construction come to in the Court of Appeal in *Ireland* is right, and that this appeal ought to be dismissed.

With respect to the costs, perhaps the rule is a wise one which we have adopted lately, that unless the parties should be disposed to settle the matter out of Court (which I should be very glad if they would), we ought in dismissing the appeal to dismiss it with costs.'

LORD COLONSAY:—

My Lords, I think the point in this case has been very fully and neatly put before us, and brought to a narrow issue as to whether this word "sole" used here is a word of technical meaning, and is inflexible in the sense which is ascribed to it by the Appellant. The word "separate" has a technical meaning; the expression "sole and separate" has a technical meaning; and the proposition now contended for is, that the word "sole" used without the addition of "separate" has the same technical meaning.

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Now, for the reasons which have been stated by my noble and learned friend on the woolsack, I am not convinced that the word "sole" has yet acquired that technical and inflexible meaning. Cases have been cited which might seem to throw some ambiguity on that proposition, as if there had been a tendency to slide into the condition of giving to this word the same technical meaning; but I do not think it has acquired that technical meaning; and I do not think that it is at all desirable that words of the same technical meaning should be multiplied. I think that where there are words already having a technical meaning which are obvious to parties, and may be used, it is not desirable to multiply such words by introducing new words of the same technical meaning, and thereby excluding them from the ordinary meaning they would otherwise have. I think, therefore, that when we find the word "sole" without the adjunct I have alluded to, it becomes necessary for us to look into the whole conditions of the instrument, and to see whether by that mode of reasoning we can arrive at the conclusion that here the testator intended this fund to be for the sole and separate use of his daughter. For the reasons which have been stated by my noble and learned friend I do not think that we are brought to that conclusion by the other clauses and provisions of this will.

LORD CAIRNS:—

My Lords, I agree entirely with what my noble and learned friend who has just addressed your Lordships has said, that we ought to be very careful indeed as to erecting new words, for the first time, in the English language into technical words or words of art; and we ought to be specially careful in doing so when we have got already a word of art which has the meaning which is endeavoured to be assigned to the word "sole" in this case. It is well known that the word "separate" has acquired a technical meaning of the character which is contended for by the Appellants in this case, and I, for my part, believe that we should be making a decision which would be novel, and one not countenanced by authority, if we were to hold now that the word "sole" has of itself, *proprio vigore*, the same or an equal technical meaning with the word "separate."

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My Lords, this decision may, no doubt, be thought to be inconvenient, and it might be more agreeable, as simplifying the course of litigation for the future, if we were able to lay down an absolute rule with regard to the meaning of the word "sole." But I believe we have no authority for doing so; and we must not, in endeavouring to ascertain what the law is, be drawn into making law for the first time. I believe it to be a question of construction in each case. No doubt, in endeavouring to construe a will, you must remember another well-known canon of construction—to give effect to all the words in the will, if effect can be given to them. In acting under that canon of construction you must in this and in every similar case, as it seems to me, ascertain what was the purpose for which the testator introduced the word "sole" into his disposition; and it may very well be that if you find the testator using the word "sole," and you are unable to see any other purpose for which he can have used it when speaking of a woman, even an unmarried woman, rather than reduce the word to silence you will infer that what he meant by using the word "sole" was to exclude the marital right of the husband.

Now bearing in mind these general observations, just let us remember what are the provisions that we find in this will. In the first place, we are dealing with a case of absolute interest in freehold and leasehold property, and not a case of income. It appears to me that that alone is a matter of considerable importance, because the tendency, as we well know, in common life is much more general and more frequently manifested to secure for the separate enjoyment of married women income rather than absolute interest.

In the next place, we find that, although this, no doubt, is a will which has created a trust, the trust clearly is not created for the benefit of this daughter; the trust is a general trust for the purpose of vesting the freehold and leasehold property in trustees to pay head rent, to pay annuities, and to pay certain specific charges upon the accumulated mass of property. And it is merely the winding-up, or the disposition of the surplus, which introduces us to the residuary devise in favour of the unmarried daughter.

Then we have to remember the very marked contrast which appears in this will between the case of this daughter and the case

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of another daughter of the testator who was actually married, and whose husband appears by the will to have been living at the time when the will was made. Dealing with that other daughter, the testator has used words which are perfectly well known, and perfectly apt, to create a trust for her separate use. He has provided that the money shall only be paid upon her receipt, which, of course, would exclude the interest of her husband. Moreover, with regard to that daughter, there is this farther contrast as to her interest,—it is limited to her for life, and then it is settled specifically upon her children; whereas, as regards the daughter whose interest is now under our consideration, there is no attempt whatever to settle her property, in the ordinary sense of the term, or to give any interest by way of purchase, independently of the mother, to any children that she might have.

Then, my Lords, we have this also, that with regard to this same daughter when the testator deals with the residue of his personal property, and also with the possibility of the £2000 given to the married daughter reverting to this other, not married, daughter, as regards both those interests it is not suggested that there are any words which would have the effect of confining those interests to her for her separate use. And it would appear to me to be a somewhat capricious and whimsical thing, if the motive of the testator was to exclude the marital right, that he should exclude that marital right from one part of the property and not from the other.

All these considerations are, I think, to be borne in mind, and then we have this final, and, as it seems to me, paramount, consideration. This testator appears to have had sisters; he appears to have had a son, and he appears to have had two daughters. He gives to his son, who possibly might have been thought to be his first object (evidently on account of some reasons personal to the son), a very small annuity, and directs it to be paid in a way which shews that he did not wish him to have the power of alienating that amount of his property. With regard to the other, the married daughter, for some reason or other (whether it was that she was provided for by settlement or not, we do not know), a limited pecuniary legacy is also given to her. And then the current of thought running through the mind of the testator appears to have been this. Having provided for his sisters, having pro-

vided for his son in this limited and qualified way, and having provided for his other daughter, he seems, in constituting, as he was about to do, his remaining daughter his universal heir both of the realty and personalty, to have desired to make it clear that she was to be that heir without any interest remaining in any other member of his family. And it was for that purpose, as it appears to me, that he used the word "sole." Reading it in that sense, the whole will is consistent from beginning to end.

Therefore I entirely concur with the proposal which has been made by my noble and learned friend on the woolsack, that the decree of the Court of Appeal in *Ireland* in this case should be affirmed; and looking to the rule, which seems to me a very wholesome one, which has obtained now in your Lordships' House for many years, although we are always glad to hear in a case of family litigation that the parties out of doors are able to arrange so as not to make the bill of costs fall more heavily on one side than on the other, still in the absence of any such arrangement, administering the law in their case in the same way as in others, it appears to me that we ought to dismiss the appeal with costs.

Decree appealed from affirmed, and appeal dismissed with costs.

Lords' Journal, 16th July, 1869.

Solicitors for the Appellant: *Vallance & Vallance.*
Solicitors for the Respondent: *Richard Comyn.*

1866
July 20–23.

MOSTYN . . . . . APPELLANT;

AND

BROOKE . . . . . RESPONDENT (1).

THIS case had been before the Master of the Rolls (2), whose decision was reversed by the Lords Justices *Turner* and *Knight Bruce* (3). It was then brought by appeal to this House, where no counsel appeared for the Respondents, and the decision of the Lords Justices was (July 23, 1866) reversed. This reversal did not affect the law as laid down in the Courts below, but proceeded on the opinion of the House that, in fact, there had not been any concealment of documents, or any misrepresentation, when the arrangements, which the suit sought to set aside, had been agreed upon.

(1) It has been suggested that, in order to prevent misconception as to the cause of the final decision in this case, the case, though not justifying a report, should be noticed.

(2) 33 Beav. 457.

(3) 2 De G. J. & S. 373.

WILLIAM JACKSON AND JOHN HOLMES . APPELLANTS;

AND

WILLIAM TURQUAND, OFFICIAL LIQUIDATOR OF THE LEEDS BANKING COMPANY . . . . } RESPONDENT.

1869
Feb. 25.

Misrepresentation—Contract—Contributories.

The directors of a banking company, in February, 1864, issued a report declaring a dividend of 15 per cent. upon the shares, and a bonus of 10 per cent., and a large addition to the reserve fund. In June, 1864, they offered to the shareholders the option of taking (according to the proportion of shares held by each shareholder) certain reserved shares at a premium. The executors of a person deceased accepted some of these reserved shares. The report of February, 1864, was, in fact, utterly erroneous, and in September the bank stopped payment. No evidence of wilfulness on the part of the directors in misrepresenting the affairs of the company was given:—

Held, that there was not enough on this state of facts to constitute a misrepresentation which would avoid the acceptance of the shares, and so prevent the Appellants from being put, personally, upon the list of contributories.

In their circular the directors also asked whether, should there be any of the reserved shares remaining undisposed of, each shareholder would say if he wished to have any shares in addition to those he might receive as his proportional shares. They also required payment to be made on or before the 1st of October. The Appellants answered that they did wish to have some additional shares. In their reply, dated the 18th of July, the directors declared that additional shares had been allotted to them, and that payment thereon must be made on a day specified *or the shares would be forfeited.* No notice was taken of this communication:

Held, that there was no complete contract as to these additional shares.

THIS was an appeal against a decision of Vice-Chancellor *Kindersley*, by which the Appellants had been retained on the list of contributories to the *Leeds Banking Company*. The Appellants were the executors of *William Sugden*, and also of *Thomas Holmes* —the former of whom held 145 shares and the latter 30 shares in this company. The company was established and registered in 1832, and each of the persons deceased had held shares in it for many years. On the 1st of February, 1864, the directors issued a report, in which a dividend of 15 per cent. and a bonus of 10 per cent., both free of income tax, were declared, and it was announced that £10,000 had been added to the reserve fund, making that fund £90,000, and a balance of £7000 had been carried to the

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contingent fund. On the 26th of May, 1864, the directors passed a resolution to issue to the shareholders certain reserved shares in the proportion of one share to every five shares held by any shareholder. On the 16th of June, 1864, they issued a circular to carry this resolution into effect. The circular announcing the resolution, and the offer of the shares, also asked, "whether in the event of any shares remaining, you wish to have any more allotted you." The Appellants had sent in the probates of the wills of their two testators, and these probates had been registered in the company's books, but the Appellants, though as executors they received the dividends, had never themselves been registered, either in their representative or personal capacity. On receiving notice of the resolution and of the offer of reserved shares, they sent back the formal acceptance, and appended to it a sentence, which in the case of *Sugden's* executorship, was as follows: "In reply to your circular of the 22nd of June, 1864, we agree to take twenty-nine shares, being our proportion of allotment, and six shares in addition (if we can have them) on the terms stated in your circular." The twenty-nine, or proportional shares, were allotted in the case of *Sugden*—and seven in the case of *Holmes*. By a resolution of the 14th of July, 1864, the demand for the additional shares was in each case granted—and six additional shares were allotted to the executors of *William Sugden*, and three to the executors of *Thomas Holmes*. An entry of these allotments was made in the company's office, in what was called "The Allotment Paper," but was not communicated to either of the Appellants. In this paper they were described as the executors of *Sugden* and of *Holmes*. On the 18th of July, 1864, a circular was sent to the executors of *Sugden*, announcing that "six*teen* additional shares, for which you have applied," had been allotted to them. The number was a mistake. The circular concluded with this notification, "The amount to be paid to the bank on or before the 1st of October next, *or the shares will be forfeited* (if paid before that time interest at 5 per cent. will be allowed) and the shares will be then entitled to one quarter's dividend at the end of the year." The Appellants did not answer this letter, nor did they pay any money in respect of the additional shares thus purported to be allotted to them, nor were their names, either as executors or otherwise, ever entered on the register of the company.

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On the 19th of September the *Leeds Banking Company* stopped payment; on the 26th a Petition to wind up was presented. On the 18th of October a winding-up order was made, and on the 31st of October the Respondent was appointed official liquidator.

The Appellants were placed on the list of contributories in respect of the original shares of their testators, and subsequently, a supplemental list called, for distinction, "Class B," was made out, including all those who held shares under the resolutions of May and June, 1864. The Appellants were placed in that class in their personal character, not merely in respect of the "additional," but also of the first set of reserved shares. The Appellants applied to the company to have their names altogether removed from the list of contributories as to any shares allotted under the resolutions of May and June, 1864. A person named *Addinell*, who was in the same position as the Appellants, brought his case before the Court, and Vice-Chancellor *Kindersley* held that the transaction as to the original reserved shares was complete, but that there had been no complete proposal and acceptance as to the additional shares, since as to them there had been a condition annexed (payment of the amount before a day named, or forfeiture) which had not been agreed to by the parties who asked for the shares (1).

In the case of the Appellants the same judgment was pronounced, and hence this appeal.

Sir *Roundell Palmer*, Q.C., and Mr. *Wickens*, for the Appellants:—

The Appellants cannot be held liable in their individual capacity. As to that point, *Fearnside* and *Dobson's Cases* (2) do not touch the present, for there the applicants for shares paid the money due in respect of them.

To constitute liability the shareholder should have been put into complete possession. That was not the case here. This was a mere executory contract. It was like an agreement between several partners that some of them should bring in an additional amount of capital at a future time. No present interest passed. The contract was not to be completed till October, and it was one which, if it was to affect the Appellants personally, the directors could not execute in its terms, for the Appellants were not "shareholders," to

(1) *Addinell's Case*, Law Rep. 1 Eq. 225. (2) Law Rep. 1 Ch. App. 231.

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whom, by the terms of the resolution of May, 1864, the reserved shares were to be issued. The directors could only deal with the Appellants in their representative character, and that being so, it was impossible to say that the Appellants could bind the testator's property, and their children's interest, by adopting, in ignorance, a gross misrepresentation as to the condition of the bank. That misrepresentation affected the grant of the original reserved shares, as to which alone there was any pretence for saying that anything like an acceptance of them had ever been made by the Appellants. That acceptance, however, was utterly defeated by the misrepresentation contained in the report of February, 1864, which had led the Appellants into making the application for the shares. *Bermingham* v. *Sheridan* (1); *Barrett's Case* (2); and *Addinell's Case* (3), were cited and commented on.

Mr. *Glasse*, Q.C., Mr. *Cotton*, Q.C. (Mr. *Kekewich* was with them), appeared for the official liquidator, but were not called on to address the House.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, in this case we have to consider whether or not the Vice-Chancellor *Kindersley* judged correctly in retaining the names of these Appellants, the executors of the two testators who held shares in the *Leeds Banking Company*, upon the list of contributories. That judgment of the Vice-Chancellor has been affirmed, and another judgment in a similar case was affirmed by the Lords Justices, though the Lords Justices differed on that occasion with reference to one portion of the case, to which the argument was principally directed.

The points that have been raised before us are these. First, it is alleged that these gentlemen, even assuming them to have entered into a contract which was executed, ought not to be fixed with the consequences of that contract, inasmuch as they were induced to enter into the contract by representations by which it is said they were or might be deceived, and that those representations consisted of a report of the directors in February, 1864,

(1) 33 Beav. 660. (2) 2 Dr. & Sm. 415.
(3) Law Rep. 1 Eq. 225.

which stated that the company was in an extremely flourishing state, a dividend being paid of 15 per cent., and a bonus of 10 per cent.; whereas at the time when those transactions took place it is alleged, and it has now been ascertained, that the company was insolvent. It is said, farther, that the representation so made by the report was made, also, again by an offer so characterised as to induce all persons receiving it to suppose that they were about to enter upon the purchase of a share in a very flourishing company, inasmuch as it was an offer for the purchase of shares which had been reserved, and which, in some way or other, had fallen into the disposition of the directors, at a premium of no less than 15 per cent.

As regards that case of misrepresentation, it is unnecessary to consider how far the law would be applicable to a case of this description, if a case of such misrepresentation had been established; because, in point of fact, we find nothing whatever upon the evidence before us to satisfy us that any misrepresentation whatever was made by the directors, or if it was so made, that it was made to their knowledge, or with such a degree of carelessness and negligence on their part in inspecting the accounts and concerns of the company as to amount to a necessary implication of knowledge on their part of the representations being false. All that we have before us is this, that they did make a very flourishing report of the state of the accounts. It is said, and it is admitted, that there were certain debts which were assumed, before the representation was made, to be good, and which now have turned out to be bad. Not one word is told us, nor any suggestion made, as to the directors having any knowledge whatever of the debts, which were reckoned to be good at the time when the representations were made, being bad. And the next account is much in the same position, because there is set out an account of debts which were not known to be bad at the time, but which ought to have been considered doubtful, and which turned out eventually to be bad. And, farther, there is set out an account, which is also admitted, from which it appears that the directors were in the habit of conducting their business in a manner which now, in the result, appears to us to have been extremely hazardous and reckless, namely, that they had advanced very large sums of money to certain gentlemen, whose names are given, upon bills—as much as

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£175,000 in the course of the year to one of those gentlemen—and that losses had been incurred in respect of those bills; and there is an estimate that the loss would be somewhere about 50 per cent. of the total amount. What those bills exactly are, what the other names on those bills are, what the security was in the view of the directors at the time when the bills were taken, what was the state of solvency of those other persons whose names were upon the bills—as to all that, we have not one word of information. It would be quite idle to suppose that the representations made by the directors under those circumstances could be assumed upon any principle of law to have been made fraudulently, or with a knowledge that that which they were representing and asserting was untrue.

But then, as regards their offering those shares at 15 per cent. premium, of course the same observation applies to that. If, in their own minds, exercising the best judgment that they could upon the matter, they were honestly satisfied that the concern was in that flourishing condition which they represented it to be in, it was not in any way improper that they should offer the shares they had to dispose of at a considerable premium.

Then the next question we have to consider is, whether or not a contract was entered into for the purchase of the shares in question. It was found that the directors had power to distribute a number of shares which had either never been issued or were forfeited, and were capable of being re-issued. On making a calculation of the number of those shares they ascertained to their own satisfaction that they could fairly offer to every proprietor a certain number of shares, first, upon his taking an aliquot part of the whole number at their disposal, in proportion to the number of shares that he already held. Then they found, or thought they might find, that after making such an appropriation, there would be the possibility of a surplus of shares, either arising from there being some odd number, or from the possibility—not at all an improbable one—of some of the shares being rejected, which might leave a residuum or surplus, which might again have to be allotted out. The course they took, therefore, was to write a letter which I can characterise in a few words, before actually reading it, as amounting to nothing more than this:—it plainly appears to me to be very distinctly expressed that they had at their disposal a certain number of shares

which they could at once offer; those shares were to be at once offered—namely, the shares which were to be offered in proportion to the number of those already held by the shareholders—they could be offered to each individual shareholder, and he could be asked, "Aye or no, will you accept them?" As to that, it was simply that they made the offer, and if it was accepted the bargain was concluded. There was another portion of shares which they could not offer, because they did not know themselves the amount that might be available. Therefore they made this proposition to the shareholders. As regards certain other shares, if there should be any surplus, tell us how many you propose to take; in other words, inviting the shareholders to make an offer for the shares not binding themselves. As to those shares, we should expect to find the shareholder would state what his offer was. As regards, therefore, the first class of shares, if the offer were accepted *simpliciter*, that would have constituted a contract in respect of those shares. And with respect to the other class of shares as to which an offer emanating from the proprietor was to be returned in answer to the letter of the secretary of the company, that would have to be considered farther by the directors, and then it would be for them to say, "Aye or no," whether they would form a contract by issuing those reserved shares.

I think the letter, as I read it, will be seen to express that very plainly. The letter is this:—"The directors of the *Leeds Banking Company* being of opinion that it is desirable to issue the reserved shares, have directed me to offer you one share for each five shares held by you at the sum of £30 per share. As you hold 145 shares, you are entitled to 29 of the new issue." Therefore there is a direct offer, a direct price, and a direct quantity, and he is to say, "Aye or no," whether he will take it: "I shall be obliged if you will, within 14 days from this date, sign and return to me the annexed form stating whether you are desirous of taking up the shares, and also whether in the event of any shares remaining you wish to have any more allotted you. If so, please say how many." That is in respect of the second class of shares, with regard to which I have said an offer was invited on the part of the shareholder to whom the letter was addressed. Then follow the words upon which another branch of the argument arises:—"If taken

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up, the amount must be paid to the bank on or before the 1st of October next;" and if paid during the interim it describes what the advantages would be that would result from doing so.

Now the answer was framed in this form; it was an answer suggested to the shareholder, and with a blank left for him to fill up, and as filled up it stands thus: "In reply to your circular of the 22nd June, 1864, I agree to take 29 shares, being my proportion of allotment." So that it was in a positive form; it was a definite offer. As I said before, the shares were to be accepted or rejected, and they are accepted. Therefore, as to one-half of the letter, the answer is precise. As to the other half, in which they are invited to make a distinct proposition, they say: "and six shares in addition if we can have them on the terms stated in your circular." They offer, therefore, to take six of those shares if the directors on their part will agree to that offer. The contract, therefore, seems to be entirely concluded upon the one set of shares, and to be entirely open as to the other set of shares, and so the Vice-Chancellor determined; he has fixed these gentlemen with the shares which they accepted, and he has not fixed them with regard to that other portion of the shares with respect to which there was no complete contract.

Now, as regards the other portion of the shares, the reason why he has not fixed these gentlemen with those, appears to me a very sound and correct one. It appears in the answer which was made to this letter on the part of the shareholder, there was, as regarded the proposed shares which the letter of the shareholder offered to take, a new term introduced, namely, forfeiture if they were not paid for at a certain definite time. Now, as regarded the shares which had been offered on the one part and accepted on the other, no new term could be added. As regarded that which was *in fieri* simply, and which is not accepted in the terms of the offer, of course the contract was not completed. But as regards the set of shares with which they were fixed, it seemed that the whole business was concluded.

The chief point remaining that we have to consider is this. It was said, with reference to this purchase, that in the latter part of the letter addressed to the shareholder the terms were that, if he took the shares, the amount was to be paid to the bank on or before the 1st of October, and if paid before that time interest at

5 per cent. would be allowed, and the shares would then be entitled to one quarter's dividend at the end of the year. It was contended that that was not an out and out purchase as from the time when the proposal was accepted, but that it was a future purchase, which did not entitle the shareholder to any benefit arising from the contract until the 1st of October, and that it was intended, in fact, to take effect as from the 1st of October.

It appears to me that the reasoning of the Vice-Chancellor and of Lord Justice *Turner*, who concurred in that reasoning, is sound, that the contract is one that is immediate, and that it gave to the person who elected to take the shares, and accepted the offer, an immediate right to the shares; that they were shares which could not be dealt with or disposed of from that moment on the part of the company. The whole right was transferred in equity from the company as a body to the individual shareholder who had agreed to take up the shares, and being so transferred, the transfer was, in effect, complete in equity on the 22nd of June, when that letter was written. And although the time for the payment was postponed till the 1st of October, the shareholder became immediately entitled to that share, and entitled to deal with that share which he had so purchased, if he had been so minded. All that is then said, is, you cannot be entitled to all the benefit of your purchase unless you make that payment either in one or other of two ways, either anterior to the 1st of October, when you will be allowed interest upon it, or on the 1st of October next, which would then be a simple payment of that purchase-money which you have at this moment, and as from this moment, agreed to make. The right to the whole profits accrued from the moment the share was thus vested in equity in the purchaser. But the profits which were then current and going forward were not to be divided till February in the following year; and this points out in the latter part of it what proportion of the aliquot part of the profits he was entitled to take as becoming a shareholder from this date, namely, that in accordance with these views which the directors had taken of the proper management of the whole matter, it would be only fair to allow the purchaser to become entitled to one-fourth of the profits in the following dividend, which was to take place in the month of February.

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The analogy which was pressed with great skill and ability upon us by Mr. *Wickens* in his argument is a false analogy. It is not the case of partners arranging amongst themselves that at a given time, on advancing farther capital, they shall be entitled to farther shares in the concern, and of course also shall be subject to farther liabilities; but it is a disposal of existing shares in the company which constitutes a separate and distinct title, which can be disposed of again to a new purchaser from the moment he makes himself master of those shares, and it appears to me it is intended that that power of disposal of the shares was to take place as soon as the offer which was so made was accepted.

A subsidiary argument was used with reference to the question of these gentlemen being executors, and a case was referred to which was a case of a totally different description.

It was a case of a proposal made to the executors of *A.* The proposal falls into wrong hands—into the hands of *B.*, a gentleman who was not an executor, and who was in no way concerned in the estate beyond this, that he was acquainted with the family, and took an active part as agent for the executrix, and therefore the proposal came into his hands. He writes in answer to the proposal: "I wish to become the purchaser myself." The other party replied by sending him shares again addressed to the executors of the deceased. Of course, he had no more right to those shares than any one of your Lordships here present. He was not entitled to accept them on behalf of the executors except as their agent contracting on their behalf, instead of which he offered to contract on his own behalf. Of course there was no contract between the parties. But that case has no reference to a case of this description, where the offer was properly made in the first instance to the man who stood upon the books as a living being, but who turned out to be dead, they being informed he was deceased; and thereupon the executors accepted the contract, and having accepted it, it appears to me that they are bound. Therefore I should offer my advice to your Lordships that we should affirm the judgment which has been pronounced by the Vice-Chancellor in this case, and that the appeal should be dismissed with costs.

LORD CHELMSFORD:—

My Lords, I entirely concur with my noble and learned friend on the woolsack, and I have nothing to add to what he has so very clearly stated.

LORD WESTBURY:—

My Lords, I have only two or three words to say with reference to the two principal arguments. It was contended by Sir *Roundell Palmer* that the circular offering the new shares at £15 premium involved a representation that the company was in a flourishing condition. Probably it would be too strong, in order to charge parties with fraud, to derive that conclusion from such a representation; but if it admitted of being so derived, there is nothing whatever in this case to shew that the parties who made such a representation knew, or ought to have known, that it was false. There has been nothing suggested as shewing anything like *malus animus*, or anything like neglect in ascertaining what they represented to be the fact.

With regard to the other point, it is perfectly clear that if a man buys an estate to be paid for at a future time, and he is to enter into possession at a future time, he has a present interest in that estate. Now, at the time of this contract, this partnership, and the estate and interest in the partnership, and all belonging to it, was represented by a certain number of shares. Of those shares the *quantum* of ownership possessed by *Sugden's* estate was represented by 145 registered and certified shares. An offer is then made to the executors to accept a farther *quantum* of ownership, and they agree to do so in the shape of twenty-nine shares. There can be no doubt that that was a present interest, the subject of treaty and the subject of contract, and that present interest passed at once to the executors of *Sugden*. It is wholly immaterial whether the purchase-money was to be paid at a future day, or whether the profits incidental to that present interest were to arise and be received at a future day. Mr. *Wickens* very ingeniously argued that that there was no present interest, but only an arrangement for future shares, and participation in the profits. I cannot agree to that argument. There was a present interest represented by the additional shares to which they became en-

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titled, and thereby augmented their right and interest in the company. The shares, the subject of the contract, were taken at once out of the power of the company and out of the coffers, as it were, of the company, and transferred to the purchaser. I have no doubt, therefore, of the accuracy of the Vice-Chancellor's decision, and entirely concur in the motion of my noble and learned friend on the woolsack.

LORD COLONSAY:—

My Lords, I have nothing to add to what has been already said by your Lordships. I entirely concur in the proposed judgment.

LORD CAIRNS:—

My Lords, I also entirely concur in the opinions which have been expressed by your Lordships. I think there is no foundation for this appeal, and that it should be dismissed.

Order appealed from affirmed, and appeal dismissed, with costs.

Lords' Journals, 25st February, 1869.

Solicitors for the Appellants: *Parker, Rooke, & Parkers.*
Solicitors for the Respondents: *Freshfields.*

CHARLES BARBER AND OTHERS . . . . . APPELLANTS;

AND

WILLIAM MEYERSTEIN . . . . . RESPONDENT.

1870
Feb. 21, 22.

Bill of Lading—First Transfer of—Stop for Freight—Sufferance Wharfs.

Where goods are at sea, the parting with the bill of lading, which is the symbol of the goods, is parting with the ownership of the goods themselves.

The same principle applies to goods which, for the convenience of parties, have been landed at a sufferance wharf. (See 11 & 12 Vict. c. xviii.; and see also 25 & 26 Vict. c. 63, s. 67.)

As long as the engagement of the shipowner has not been completely fulfilled, the bill of lading is a living instrument, and the transfer of it for value passes the absolute property in the goods.

It has not been fulfilled when the goods, though actually landed at a wharf, are subject to a stop order.

The person who first gets the bill of lading (though only one of a set of three) gets the property which it represents, he need not do any act to assert his title, which the transfer of the bill of lading of itself renders complete, and any subsequent dealings with the others of the set are subordinate to the rights passed by that one.

Though the shipowner or wharfinger, having no notice of the transfer of one bill of lading, may be excused for delivering the goods to a person who produces to him another bill of lading which has in reality been subsequently taken, that does not affect the legal ownership of the goods as between the holders of the two bills of lading.

The Acts relating to landing goods at a sufferance wharf were intended for the protection of the shipowner.

THIS was an appeal, under the *Common Law Procedure Act*, 1854, against a decision of the Court of Exchequer Chamber, by which a previous decision of the Court of Common Pleas had been affirmed (1).

The facts were these:—In August, 1864, *De Souza & Co.*, of *Madras*, shipped on board the *Acastus* 227 bales of cotton consigned for sale on commission to *Azémar & Co.*, of *London*. There were three bills of lading making one set. They were in the usual form, except as to the last sentence, which concluded thus: "In witness whereof I, the said master of the said ship, have affirmed to three bills of lading, all of this time and date, *one of which being accomplished, the others to stand void.*" In August, 1864, the vessel

(1) Law Rep. 2 C. P. 38, 661.

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sailed for *London*. *De Souza & Co.* drew bills of exchange against this cotton upon *Azémar & Co.* for £3000, £1000, £1000, and £1000, to fall due between the 12th of January, 1865, and the 22nd of March, 1865. These bills were duly accepted by *Azémar & Co.*, and were then, with the three bills of lading, deposited with the *London* branch of the *Chartered Mercantile Bank of India*. At the end of 1864, *Azémar & Co.* transferred their business, including the consignment by the *Acastus*, to one *Abraham*, who had formerly been in their employment.

The *Acastus* arrived in *London* on the 31st of January, 1865, and went into the *St. Katherine's Docks*. On the 2nd of February *Abraham* made an entry of the cargo at *Cotton's Wharf* (which is a public sufferance wharf) in the form given by one of the Customs Acts, the 16 & 17 Vict. c. 107, s. 60. The *Sufferance Wharf Act*, 11 & 12 Vict. c. xviii., contains (cl. 5) the following enactment, important for the consideration of this case, that "all goods which after the passing of this Act shall be landed at any of the public sufferance wharves aforesaid" (of which *Cotton's Wharf* was one), "from, or out of, any ship within the port of *London*, and lodged in the custody of the wharfinger for the time being in the occupation of such wharf, either at such wharf or elsewhere, shall, when so landed, continue and be subject to the same lien or claim for freight in favour of the master and owner of the ship from or out of which such goods shall be landed, or of any other person interested in the freight of the same goods, as such goods were subject to whilst the same were on board such ship, and before the landing thereof: and the said wharfinger, his servants and agents, are hereby required, on due notice in writing in that behalf given by such master or owner or other person aforesaid to the said wharfinger, &c., to detain such goods in the warehouse of the said wharfinger, &c., until the freight to which the same shall be subject as aforesaid shall be duly paid, together with the wharfage rent and other charges to which the same shall have become subject and liable." There were two "stops" lodged against this cotton from the *Acastus*, one by the *Chartered Mercantile Bank of India*, the other by the master for the freight. On the 9th of February *Abraham* instructed *Barber & Co.*, as brokers, to sell the cotton, and they obtained from him an order, in virtue of which

they were allowed to take samples. On the 4th of March *Abraham* gave a cheque which covered the sums due to the *Chartered Mercantile Bank*, and thereupon the bank delivered up to him the three parts of the bill of lading, and so put an end to the "stop" which had been lodged on account of the bank. On the same day he deposited with *Meyerstein* (with whom he had other transactions) one of the three parts of the bill of lading for the cotton by the *Acastus*, together with the original consignment to *Azémar & Co.*, and thereupon *Meyerstein* gave to *Abraham* a cheque for £2500, which was duly paid. *Meyerstein* asked for the second part of the bill of lading, and received it. He did not, however, ask for the third part, believing that the third part was retained by the captain of the vessel.

Barber & Co. were wholly ignorant of these transactions, and on Monday, the 6th of March, Mr. *C. Barber* advanced to *Abraham*, by cheque, £1500 on the cotton by the *Acastus*, and on the next day, the 7th of March, made, by cheque, a farther advance of £500 upon receiving the third of the set of bills of lading (which had been fraudulently kept by *Abraham*), and on being at the same time informed of the fact that the stop order for freight had been removed. On the 11th of March *Meyerstein* heard for the first time that the *Barbers* had been employed by *Abraham* to offer the cotton for sale. On that day they lodged their third copy of the bill of lading at the wharf. On the same day *Meyerstein* obtained from *Abraham* a letter addressed to Messrs. *Barber*, requesting them to pay over to him "the surplus net proceeds of the undermentioned goods, after satisfying the advances you have made us (*Abraham & Co.*) upon the same." Among the goods thus mentioned was the cotton by the *Acastus*. *Meyerstein*, on receiving this note, struck his pen through this item, saying he did not want to have stolen goods transferred to him. He, however, forwarded the note to Messrs. *Barber*, and stated the fact of his making the advance of £2500, though the evidence left it doubtful whether he stated the exact date at which it had been made. On the same day Messrs. *Barber* wrote to *Meyerstein*: "We have this day received a letter from Messrs. *Abraham & Co.* requesting us to pay over to you the surplus net proceeds of 324 bales of cotton, as per memorandum at foot, which shall receive our attention in due course." This memo-

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randum was a copy of that sent by *Abraham*, and the *Acastus* was struck out of it—the total number of bales in each case being only 324, while if those of the *Acastus* had been retained in the list there must have been 277 added to that number. On the 13th of March the *Barbers* obtained from the wharfingers at *Cotton's Wharf* delivery warrants made out in their own names for the 277 bales of cotton, which they sold to different purchasers, who received them under the warrants delivered by the *Barbers* to them. The *Barbers* claimed to satisfy themselves in the first instance for their advances out of the proceeds of the sales. *Meyerstein*, who insisted that his claim took precedence of theirs, thereon brought his action against *Barber & Co.* The declaration was in the form of money had and received, with a count for wrongful conversion. The Defendants pleaded, never indebted, not guilty, and that the goods never were the Plaintiff's. Issue was taken on all these pleas.

At the trial, before Lord Chief Justice *Erle*, in June, 1866, he directed a verdict to be entered for the Plaintiff for the whole sum he claimed, reserving leave for the Defendants to move to enter a verdict for them. The rule was obtained, and was, on argument, discharged. On appeal to the Exchequer Chamber, the judgment of the Court of Common Pleas was affirmed. This appeal was then brought.

Sir *R. Palmer*, Q.C., and Mr. *Grantham*, for the Appellant:—

The delivery of the cotton here was complete when the goods had been landed, and landed under the order of *Abraham*: *Bourne* v. *Gatliff* (1). As between the captain of the ship and *Abraham* the voyage was then at an end; *Abraham* then stood in the condition of absolute owner, with all the rights belonging to an absolute owner. The goods were sold under his direction. A subsequent purchaser for value could not be affected by a previous indorsement of one of the bills of lading. The very form of the bill of lading was sufficient to put any one on his guard. No stop was put upon the cotton by *Meyerstein*, nor notice given by him to anybody of anything that had been done to give him a title to the cotton. Nay, when a list of goods sent by different vessels was forwarded

(1) 11 Cl. & F. 45.

to *Meyerstein*, in which list the cotton of the *Acastus* was included, he said that he did not want goods which had been stolen from other people transferred to him, and struck his pen through the name of the vessel and its cargo. In no way, therefore, had the *Barbers* any notice of *Meyerstein's* claim. The shipowners' right was a mere maritime right, and could not, therefore, affect that of the consignee as between him and a purchaser for value. When the goods are once landed the wharfinger, who is not bound to decide upon contending titles, is justified in delivering them to the first person who presents a sufficient voucher of title to them. The bill of lading held by the *Barbers* was sufficient. Here the goods were sold in the market, and the title to them was complete. A mere pledge of them without actual delivery will not pass the property: *Ryall* v. *Rowles* (1). Here there was a mere pledge of the goods, and *Reeves* v. *Capper* (2), and *Martin* v. *Reid* (3), referred to by Mr. Justice *Willes* in the Court below, do not, therefore, apply to weaken the effect of that general doctrine.

The wharfinger may deliver up the goods on production of the bill of lading, or on a delivery warrant, if there is no stop order. There was no stop order when the delivery was made, it had been removed; but the master's stop order was in full force when the bill of lading was given to *Meyerstein*.

When the goods first arrived in this country, the persons representing the *Chartered Bank of India* were the holders of all the three bills of lading, but they put upon the goods at the wharf a stop order for the money due to the bank. That shewed that they did not deem the mere possession of the bills of lading to give them complete power over the goods which had been landed. While goods are at sea the bill of lading is, no doubt, the only symbol of property, but that is not so when they have been landed. It is merely evidence of the contract between the shipowner and the charterer, or the consignee, and when the shipowner has landed the goods he has done all that is necessary to entitle himself to payment, and his only right is to stop the removal of the goods until he is paid. The provisions of the Act, which requires

(1) Tudor's Leading Cases, 2nd Ed. vol. ii. p. 651; 3rd Ed. p. 670, and the cases there cited.

(2) 5 Bing. N. C. 136.

(3) 11 C. B. (N. S.) 730.

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the wharfinger not to deliver as against a stop order of which he has notice, shew that he is bound to deliver when that stop order has been removed. The wharfinger is only entitled to look to the bill of lading as a *primâ facie* voucher for ownership—he is not bound to inquire whether there are more bills of lading than one, or under what circumstances the bill of lading presented to him has been obtained. [THE LORD CHANCELLOR:—The real question is between the bill of lading and the delivery warrants. You argue that a delivery warrant supersedes the bill of lading. They say that the two are but symbols of property, and that the bill of lading first assigned passes the property.] Here the *Barbers* took a bill of lading which was valid, and was completely effectual to pass the property in the goods, for it was given to them after the stop order was removed; they did not accept it until they were satisfied that the freight had been paid. Till that stop order was removed a bill of lading could not effectually pass the property. They took all possible precautions, and acted *bonâ fide*, and so ought to be protected. Having this valid bill of lading in their possession they applied for and obtained the delivery orders, which made their title to the goods complete.

The Judges in the Courts below assumed that the bill of lading was the only instrument which controlled the possession of the goods. That is not so. To be so the bill of lading must, in the first place, be identified with the goods. But that is impossible in many cases, for, especially in the case of gums and other like cargoes from *India*, they may be repacked and marked differently, and that is often the case with cotton. In that way the identity would be destroyed.

It is an error to suppose that the mere handing over of one copy of the bill of lading passes the goods. All the copies here shewed that no one was perfect in itself. It was distinctly stated that there were three, "one of which being accomplished the others shall stand void."

All three parts are of equal force, and here it is so not by any mere legal inference, but by the very words of the master. He, therefore, who, when no stop order exists, first presents the bill of lading to the wharfinger, first "accomplishes" the purpose for which it is given, and the other copies of the bill then stand void: *Black-*

burn on the Contract of Sale (1). It is perfectly clear that if bills of lading are in the hands of two different holders the wharfinger is not bound to examine the validity of their respective titles, all he has to do is to deliver the goods. To that effect is the case of *The Tigris* (2), where it was held, that if bills of lading are presented to the master by two different holders, and he delivers to one, no right of action against him accrues thereby to the disappointed holder, as it is not for the master to inquire as to who has the better right. The judgment in the Court below is erroneous in declaring that "the person who holds the first bill of lading for value is entitled to the goods." All the three parts are of equal force, and the first that is "accomplished" alone has superiority over the rest. It is to be accomplished by other acts than the mere holding of it, and those other acts were, in this case, first performed by the *Barbers*.

Meyerstein was never entitled to the possession of the goods; he had not paid the dock fees, and so had not obtained the dock warrant. The mere possession of one copy of the bill of lading was not sufficient to vest the property of the goods in the holder of it: *Short* v. *Simpson* (3), where Mr. Justice *Willes* says on that point (4): "It may be that the bill of lading would be exhausted by delivery of the goods at the dock as the warehouse of the consignee." It was so here. The delivery under the bill of lading was complete when the master ceased to be liable for the custody of the goods. Indorsement of the bill of lading after the delivery of the goods, which the landing was in this case, does not operate more than an indorsement of it after a loss. Something more is necessary to pass the property in the goods. A sale would override all bills of lading, but a mere conditional transfer like this will not do so: *Pease* v. *Gloahec* (5). The *Barbers* did not advance money on the bill of lading, but on the goods themselves; they took all the usual and proper precautions, while *Meyerstein* contented himself with the mere holding of the two copies of the bill of lading. As between two such parties he is the better entitled who takes every care to make good his title to the pro-

(1) Pages 297, 298, 302.
(2) 32 L. J. (A. & P.) 97.
(3) Law Rep. 1 C. P. 248.
(4) Ibid. 253.
(5) Law Rep. 1 P. C. 219.

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perty. As in the case of a man with a certain sum of money at his bankers drawing two cheques, he who first presents the cheque given to him is the person entitled to receive and to hold the money. The dock warrant was equivalent to an accepted delivery order, and vested the property at once in the *Barbers*, whose title to it then became complete.

Sir *G. Honyman*, Q.C., and Mr. *Bridge* (Mr. *Watkin Williams* with them), for the Respondent *Meyerstein*, were not called on.

THE LORD CHANCELLOR (Lord *Hatherley*) :—

In this case the House is called upon to reverse unanimous judgments of the Court of Common Pleas and of the Court of Exchequer Chamber. The effect of these judgments is this—to determine that, as to the Plaintiff, the indorsee for value of a bill of lading of goods which, at the time of its being indorsed to him, were landed at a sufferance wharf on the *Thames*, and were there subject to two stops put upon them (the one by the shipowner for freight, the other by certain mortgagees), the security so indorsed is available in preference to the claim of the Defendants, who, subsequently to such indorsement, obtained possession of the goods under the circumstances I am about to mention. A bill of lading was drawn up in a set of three, and after the indorsement of the first two of the three to the Plaintiff had taken place, the consignee of the goods fraudulently retained the third, and obtained advances from the Defendants on the security, in the first place, of this third, and proceeded afterwards to the wharf where the goods had been deposited, and after the production of this third bill of lading obtained the removal of a stop which had been put upon the goods for freight. I should have before mentioned the previous removal on the part of the mortgagees (the directors of the *Chartered Bank of India*) of their stop in respect of their mortgage. Possession of the goods was, under those circumstances, obtained by the Defendants, the persons who, on receiving this third bill of lading thus fraudulently retained by the consignee, made to him an advance on the goods represented by this bill of lading.

The question has really turned upon one point, and I may almost say upon one point alone, namely, whether or not the bills of lading had fully performed their office, and were discharged and

spent at the time that the Plaintiff took his security. Whether, in other words, the landing of those goods at the sufferance wharf in the name of the consignee, but subject to the stop which was put upon them by the shipowner, and the stop put upon them by the mortgagees, was, or was not, a delivery which had exhausted the whole effect of the bill of lading. That, I think, is the single point to which the case becomes reduced.

It appears to me, my Lords, that there are one or two points of law which must be taken to be clearly established, although very able efforts, employed with considerable ingenuity and resource, have been directed to the shaking of those well-established points of law. I refer particularly to the very able argument we have heard from Mr. *Grantham* in this case with reference to the first step, if I may so call it, in the proceeding, namely, the fact of the first assignment for value of a bill of lading when the goods are not landed, but are still at sea. Now, if anything could be supposed to be settled in mercantile law, I apprehend it would be this, that when goods are at sea the parting with the bill of lading, be it one bill out of a set of three, or be it one bill alone, is parting with the ownership of the goods.

Mr. *Grantham* has raised this argument upon the frame of the bill of lading itself, which I apprehend is in the common form where three bills are given. The form of the bill of lading to which he specially referred, and upon which he founded the argument I now advert to, is this, that the shipper undertakes to deliver these goods, the cotton, to the *Souzas* or order, or to their assigns, he or they paying the freight for the goods at the rate there mentioned; and then, at the end of the document we have these words, "In witness whereof I, the master of the ship, have affirmed to three bills of lading, all of this tenor and date, one of which being accomplished the others to stand void." The argument has been this, that the bill of lading has not accomplished its office until not only the goods are landed, but the freight is paid, and the whole matter which is the subject of the contract of the shipowner has been achieved; and that, accordingly, if that be law, it follows that if one bill of lading be assigned while the ship is at sea, and a second bill of lading be assigned to a second person, fraudulently, of course, and a third bill of lading be assigned to a

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third person, also fraudulently, of course, it becomes simply a matter of expedition and race between the several parties who have taken those different assignments of the bills of lading; because until the goods have actually been landed and fully delivered, each bill of lading, according to the argument, is to be considered as of equal force until one of the bills has been, according to the argument, accomplished.

Now, I apprehend that it would shake the course of proceeding between merchants, as sanctioned by decided cases (which the learned counsel admitted to have been decided, and never yet to have been altered or reversed), if we were to hold that the assignment of the bill of lading, the goods being at the time at sea, does not pass the whole and complete ownership of the goods, so that any person taking a subsequent bill of lading, be it the second or be it the third, must be content to submit to the loss which would result from that state of facts. I apprehend that no decision can be found to the effect that any person taking an assignment of a bill of lading, knowing that others existed, is to be held to have been guilty of fraud simply from the fact of his so acting. No authority, at all events, has been cited for that proposition. And no authority has been cited at the Bar to shew that the transaction is not entire and complete when once the bill of lading has been assigned, as respects, at all events, goods *in transitu*, whether the assignment be by mortgage or by sale. If it were by sale other considerations would intervene which would give still greater efficacy to the assignment of the goods without delivery or possession. But when the vessel is at sea and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which, for the purpose of conveying a right and interest in the property, is the property itself. It appears to me that to shake any conclusion of that kind would be entirely to annihilate the course of mercantile procedure which has existed for a long period of time—far longer, probably, than I can at this moment accurately state.

That being so, the Judges have reasonably assumed that proposition as a point of undeniable law. Then, if the property so passes when the goods are at sea, the whole question resolves itself into this: What is the effect of the assignment of the bill of lading

under the circumstances of this case, when the goods were not at sea at the time when the interest was passed, but were at a sufferance wharf in the name and by the order of the consignee, *Abraham*, who represented the original consignees, the *Souzas*, subject to the stop-order in respect of freight, and subject to the stop-order given to the chartered bank.

Now the circumstances are briefly these as to the dates: On the 4th of March, the goods being in the situation I have described, *Abraham*, the person who has been guilty of this fraud, not being then in possession of the bills of lading himself, inasmuch as all three were at that time in possession of the bankers, applies to the Plaintiff *Meyerstein* for a loan; he obtains money from *Meyerstein;* he first draws a cheque to meet the claim at the bank, a cheque provided for by the moneys advanced to him by *Meyerstein*, and then he obtains the three bills of lading from the bank. And on the same 4th of March, having these three bills of lading for a few minutes or a few hours in his possession, he does nothing with them in the way of claiming possession of the goods; he makes no use of them for that purpose, but he at once pledges two of these bills for value to *Meyerstein*. And that pledge being so completed, *Meyerstein* is in possession of these two bills with no other charge or claim whatever upon the goods they represented except the claim for freight, the freight being still unsatisfied. The mortgage had been cleared off, and he had become the owner of the property by this transaction, and he remained the owner subject to the payment of the freight. Then afterwards, fraudulently, *Abraham* enters into farther dealings with his brokers. His brokers are aware that the goods have arrived. They obtain a partial order from *Abraham*, by which they are enabled to obtain a sample of the cotton in question; but they decline in the first instance to make him any advance. He proposes to obtain an advance on the bill of lading *simpliciter*, which they decline to make. But they were afterwards induced to make the advances when they had seen the goods themselves at the wharf, and when steps had been taken by *Abraham* for procuring money to enable him to discharge the stop which existed upon the goods for the freight. The stop which existed in respect of the mortgage had been already discharged, and the property, therefore, became apparently at his

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disposal. The Defendants, being ignorant of the transaction with *Meyerstein*, on the 11th of March obtained possession of the goods, and on the same 11th of March *Meyerstein*, for the first time, discovers the fraud which has been perpetrated upon himself. When he wishes to obtain possession of the goods he finds that they have been removed. And hence, of course, a contest arises between the two parties.

Then in that state of things the question that arises is this: The goods, it is urged, were at home when *Abraham* was empowered by the Act of Parliament to give directions that the goods should be placed on the wharf as the goods of him, the consignee. But, however, the question arises whether these goods could in truth be said then to be at home. It is said that, at all events when for those few hours the three bills of lading were in possession of *Abraham*, and the goods were at home, as all the symbols of property were also in the hands of *Abraham*, therefore the symbol and the thing symbolised had become united, and that, in truth, the whole matter might be said to be disposed of. Now is it so? Can it be said that when for those few hours those documents were in the hands of *Abraham*, he had the control and proprietorship of the goods? Certainly when he first gave directions for their being warehoused in his name he was in no sense proprietor. He had neither the bills of lading, nor had he discharged the freight, nor had he in any other way put himself in a situation to entitle him to demand the goods. But now, having the bills of lading, supposing he had been minded to go down to the wharf to demand the goods, what would have happened? He would have found a stop placed upon the goods for the freight. And what would have been his position? By virtue of the 5th clause of the particular local Act (11 & 12 Vict. c. xviii.) referring to this subject, he would have found that he could not obtain any obedience to any delivery order which he might think proper to give, and that he could not obtain any warrant of delivery, because there had been placed upon the goods this stop for the freight. The Act expressly enacts that when a stoppage has been put at the right time, namely, before the issue of any warrant for delivery, or the acceptance of any order, then no wharfinger shall be authorized to issue any warrant, or to accept any order, for the delivery of any

goods thus subject to a lien for freight. Accordingly, therefore, the goods would not have been delivered to him had he made use of those bills of lading instead of delivering them over to *Meyerstein*, and in that sense, undoubtedly, the goods were not at home as far as he was concerned.

Then, the first proposition of law being clear—that an indorsement of the bill of lading carries with it the property in the goods when the goods are at sea, the next proposition of law that we have to consider is this, laid down by all the Judges who have delivered their opinions in this case, and, as it appears to me, correctly laid down by them. It is stated by Mr. Justice *Willes* in his very elaborate judgment, in which he says: "I think the bill of lading remains in force at least so long as complete delivery of possession of the goods has not been made to some person having a right to claim them under it." Mr. Justice *Keating* says, in the same way, that he considers that "there can be no complete delivery of goods under a bill of lading until they have come to the hands of some person who has a right to the possession under it." And afterwards, in the Exchequer Chamber, Mr. Baron *Martin*, putting the case on somewhat different grounds, says: "For many years past there have been two symbols of property in goods imported; the one the bill of lading, the other the wharfinger's certificate or warrant. Until the latter is issued by the wharfinger the former remains the only symbol of property in the goods. When, therefore, *Abraham* delivered the bill of lading to the Plaintiff on the 4th of March, 1865, as a security for the advance then made to him, such delivery amounted to a valid pledge of the goods, and the Plaintiff thereby acquired a right to hold them as against *Abraham* and all persons claiming title thereto under him." The principle seems to be the same, according to the view which Mr. Baron *Martin* takes, which is this: There has been adopted, for the convenience of mankind, a mode of dealing with property the possession of which cannot be immediately delivered, namely, that of dealing with symbols of the property. In the case of goods which are at sea being transmitted from one country to another, you cannot deliver actual possession of them, therefore the bill of lading is considered to be a symbol of the goods, and its delivery to be a delivery of

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them. When they have arrived at the dock, until they are delivered to some person who has the right to hold them the bill of lading still remains the only symbol that can be dealt with by way of assignment, or mortgage, or otherwise. As soon as delivery is made, or a warrant for delivery has been issued, or an order for delivery accepted (which in law would be equivalent to delivery), then those symbols replace the symbol which before existed. Until that time bills of lading are effective representations of the ownership of the goods, and their force does not become extinguished until possession, or what is equivalent in law to possession, has been taken on the part of the person having a right to demand it.

It appears to me that that is the legal sense of the transaction. The shipowner contracts that he will deliver the goods on the payment of freight. He discharges his contract when he delivers the goods. But, unless he chooses to waive his rights, he is not bound so to deliver the goods, or to hand them over to the person who is the original consignee to whom he has contracted to make the delivery, until all the conditions on which he contracted to deliver them are fulfilled. One of those conditions is, that the freight should be paid; and until the freight has been paid he is not bound to make the delivery.

Mr. Justice *Willes* explains what is the effect of these various Acts of Parliament. These Acts of Parliament are not intended to deprive the shipowner of the right which he has to say that he will not part with the possession of the goods until freight is paid. Accordingly, the local Act first enacted that there should be a power on the part of the shipowner to relieve himself from the responsibility, which might be extremely inconvenient to all parties, of keeping the goods on board, when either the consignee was not ascertained, or when, if ascertained, there were some laches on his part in demanding the delivery of the goods. In such a case the shipowner, by depositing them in a warehouse, placed them in such a condition that if their owner could not be ascertained the goods should be considered as if they were still at sea, in the absolute possession of the master to all intents and purposes. But if the owner of the goods could be ascertained, and the only question was the question of freight, still the Act of

Parliament provided that the shipowner should be protected, that he should not be bound to hand over the goods absolutely, but that he should hand them over *sub modo*, with the full right of retaining his lien on the goods themselves, and with the right of preventing them being dealt with or removed until that lien should be satisfied. The legal effect of the proceeding is this, that the proprietor or consignee may require the goods to be landed at a wharf, and to be warehoused in his name, but subject to this condition, that the shipowner still retains his interest in the cargo until his charge for freight has been defrayed. If he gives notice of that charge prior to any act being done by which the ownership of the goods is changed, prior to the acceptance of an order for delivery, and prior to the issue of a warrant for delivery, then the shipowner's lien holds and attaches itself to those goods, and the goods cannot be removed; the bills of lading cannot be considered as having been fully spent or exhausted, because there remains an important part of the contract unfulfilled on the part of the consignee, namely, payment of the freight in respect of which the contract was entered into.

That seems to me to be the whole basis of the judgment at which the learned Judges arrived in the Courts below, and which, as I before stated, was their unanimous conclusion. But against it several objections have been urged. It is said that a frightful amount of fraud may be perpetrated if persons are allowed to deal in this way with bills of lading drawn in sets, if you allow efficacy be given to the first assignment of one of those bills, to the detriment of persons who may take, for value, subsequent assignments of the others. All that we can say is, that such has been the law hitherto, and that the consequences of the supposed evil, whatever they may be, have not been considered to be such as to counterbalance the great advantages and facilities afforded by the transfer of bills of lading. There is no authority or reason for holding that the person who first obtains the assignment of a bill of lading, and has given value for it, shall not acquire the legal ownership of the goods it represents. It seems to be required by the exigencies of mankind. It may be a satisfaction to be told by Mr. Justice *Willes* (though it is a matter upon which I put no reliance), that other nations concur with us in holding that (whatever incon-

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veniences there may be attending it), the person who gets the first assignment for value is the person to be preferred.

The reasoning of the learned Judges in this case establishes clearly these two propositions: First, that the holder of the first assignment for value obtains a priority over those who obtain possession of the other bills. And, secondly (following the reasoning of Mr. Justice *Willes*), "The wharfinger under these circumstances was, at the lowest, the common agent for the shipowner and for the consignee or holder of the bill of lading—agent for the consignee or holder, upon his producing the bill of lading shewing that he was entitled to the goods, and upon his paying the freight, to transfer the goods into his name, and to deliver them to him, or give him a warrant for them—and agent for the shipowner to retain possession of the goods and to permit no one to exercise any control over them until the claim for freight had been satisfied. During this period, therefore, the bill of lading would not only, according to the usage, and for the satisfaction of the wharfinger that he was delivering to the right person, be a symbol of possession, and practically the key of the warehouse, but it would, so far at least as the shipowner was concerned, retain its full and complete operation as a bill of lading, there having been no complete delivery of possession of the goods." The other learned Judges take the same view; and I apprehend that the correct view in substance is this—that this being the possession of the wharfinger, the bill of lading remains in force so long as complete delivery and possession has not been given to some person having the right to claim such delivery and possession.

As to the argument founded on the possibility of fraud, I agree very much with one of the learned Judges, Mr. Justice *Willes*, who says, that as to any argument upon that subject, "all arguments founded upon the notion that the Court is to pronounce a judgment in this case which will protect those who deal with fraudulent people, are altogether beside the facts of this case, and foreign from transactions of this nature." I am afraid that the protection of parties against fraud is a matter of difficulty with which the Legislature must cope, as far as it can possibly do so, from time to time, when frauds of a serious character are practised; but the Courts of Law, which have to administer the law

as it exists, cannot alter their course of proceeding because those who ought to do that which is right and just to their neighbours find means of defrauding them in spite of all the protection which the law may have thrown around the innocent holders of property. Judicature has no power to interfere with the course of proceeding in such cases. It must be left to the Legislature alone. But, on the other hand, we should consider that our mercantile laws, which are founded on long usage, have been found to work well for the general convenience of those engaged in those large adventures which are familiar to the enterprise of this country, and that although occasional inconvenience may have been caused by the fraudulent behaviour of some parties, yet these laws have, upon the whole, been felt to operate beneficially.

The principles which, as I have stated, form the foundation of the judgment in the present case are, that the parting with the symbol of property the possession of which cannot be delivered is the parting with the property itself; and that persons who have not a complete ownership and possession of the property cannot be said to have such a title to that property as to divest the operation of the symbol to give a title to it, until something occurs which brings the symbol and the property itself into contact—and that for the purpose of so bringing the property and the symbol into contact, there must be a complete concurrence of title in the person who holds the symbol and the person who has the right to demand the property; and until that happens the symbol, as in the present case, has not exhausted its office.

I am, therefore, of opinion that the learned Judges have come to the right conclusion, and I have to move your Lordships to affirm the two decisions which are complained of in this appeal.

LORD CHELMSFORD:—]

My Lords, I entirely agree with my noble and learned friend on the woolsack, and I do not feel justified in trespassing on your Lordships, except for a very few minutes. My noble and learned friend has stated very truly that the only question in this case is this:—Where goods are shipped under bills of lading deliverable

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to the consignee or his assignees, and upon the arrival of these goods they are deposited by the orders of the consignee at a sufferance wharf or other wharf, and there warehoused, and a stop is put for the payment of freight upon the goods in the warehouse, whether, under these circumstances, the bill of lading has performed its duty, and whether it has (to use the expression which the learned Judges have used) become exhausted, and has ceased to be the symbol and representative of the goods. If the bill of lading continued operative, then, of course, the pledge of these goods to *Meyerstein* gave him constructive possession of them.

Now, upon this point we have the opinion of no less than nine Judges unanimously determining that the bill of lading was not exhausted, but that at the time of the transaction with *Meyerstein* it continued a living document. Mr. Justice *Willes*, in his very able judgment, puts the case shortly and clearly. He says: "There can be no complete delivery of goods until they are placed under the dominion and control of the person who is to receive them. Here *Abraham* could not have the complete dominion and control of the cotton until he had discharged the liability incurred by the shippers for the freight stipulated for in the bill of lading."

Now, my Lords, it must be remembered that at the time of this transaction the goods in the warehouse were under a double stop. They were under the stop of the *Chartered Bank of India* for advances made by the bankers, and they were also under the stop for freight. At that time, therefore, on the 4th of March, *Abraham* could not have dominion and control over the goods, because there were many preliminary things to be done before he could entitle himself to obtain possession of them. It was on the 7th of March that the stop of the *Chartered Bank* was withdrawn, and from that time the goods remained in the warehouse only under the stop for freight. But at that time *Abraham* had not the dominion and control over the goods, because he could not obtain possession of them without producing to the wharfinger a withdrawal of the stop for freight, which withdrawal he could only obtain upon either paying or tendering the amount of the freight.

In the local Act which governs this transaction the 5th clause enacts as to the notice to be given to the wharfinger, and then it says expressly that "Nothing herein contained shall authorize any wharfinger to deliver or issue any warrant, or accept any order, for the delivery of any goods which shall be subject to a lien for freight, and in respect of which such notice in writing as aforesaid to detain the same for freight shall have been given, until the importer, proprietor, or consignee of such goods shall have produced a withdrawal in writing of the order of stoppage for freight from the owner or master of the ship from or out of which such goods shall have been landed, or his broker or agent, and which order of withdrawal the said master or owner is hereby required to give on payment or tender of the freight to which the goods shall be liable."

Therefore it seems to me perfectly clear that at the time of the transaction, on the 4th of March, *Abraham* had not complete dominion or control of the goods, because, as Mr. Justice *Willes* has said, it is only when he is entitled to immediate possession of the goods, without anything more being done, that the bill of lading will have become exhausted, and will not operate at all to transfer the goods to any person who either has advanced money or has purchased the bill of lading.

Under these circumstances, I am of opinion that the nine Judges who were unanimous in their judgment (three of the Court of Common Pleas, and six of the Court of Exchequer Chamber) were perfectly right in the conclusion at which they arrived, and I think their judgment ought to be affirmed.

LORD WESTBURY:—

My Lords, I hardly feel that I am justified in adding any observations to what has fallen from my noble and learned friends, but as it is extremely desirable that there should be no doubt in the mercantile world with regard to legal principles that have long been recognised, I will say a very few words. Unquestionably the bill of lading, as long as the engagement to the shipowner has not been fulfilled, is a living current instrument, and no doubt the transfer of it for value passes the absolute property in the goods.

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It is unquestionable (as has been said here by one of the Judges), that the handing over the bill of lading for any advance, under ordinary circumstances, as completely vests the property in the pledgee as if the goods had been put into his own warehouse. There can be no doubt, therefore, that the first person who for value gets the transfer of a bill of lading, though it be only one of a set of three bills, acquires the property; and all subsequent dealings with the other two bills must in law be subordinate to that first one, and for this reason, because the property is in the person who first gets a transfer of the bill of lading. It might possibly happen that the shipowner, having no notice of the first dealing with the bill of lading, may, on the second bill being presented by another party, be justified in delivering the goods to that party. But although that may be a discharge to the shipowner, it will in no respect affect the legal ownership of the goods, for the legal ownership of the goods must still remain in the first holder for value of the bill of lading, because he had the legal right in the property.

Now, this case depends upon one simple inquiry,—whether, on the 4th of March, when the bill of lading was given to *Meyerstein* for the sum of money then advanced and paid by him, that bill of lading was a living, current, unexhausted contract? The contract (as I have said) by the shipowner remains in force until he delivers possession of the goods. The question, then, is simply this: Had the shipowner delivered possession of the goods on the 4th of March? That depends on the character of the wharfinger's possession.

I cannot but notice the very loose and apparently irregular mode of proceeding which appears to have been pursued here. In reality, the goods appear to have been transferred from the ship to the sufferance wharf by the interference of *Abraham*, who at that time was not the holder of any of the bills of lading. All *Abraham's* acts with regard to the goods whilst the bills of lading were in the hands of other holders for value were wholly unauthorized. They were, in reality, the acts of a stranger. The goods, however, got to the sufferance wharf, and there they were immediately stopped for freight due to the shipowner. The ship-

owner's lien was asserted, and with the lien the shipowner's right of possession was equally asserted. The effect, therefore, was, that the wharfinger, at all events, held for the shipowner. The possession of the wharfinger was the possession of the shipowner, whose freight remained unpaid. The answer to one question, therefore, is, that on the 4th of March, when the first bill of lading was transferred for value to *Meyerstein*, the bill of lading was a living, unexhausted instrument, because the contract to deliver possession by the shipowner had not been completed, because he had a lien on the goods for freight. There can be no doubt, therefore, that the bill of lading at that time was a negotiable instrument; and if it was so, then *Meyerstein* had obtained the actual property in the goods by the transfer to him of the bill of lading. Having that actual property in the goods, there was no obligation on him to do more.

It was contended at the Bar that he had been guilty of laches because he did not follow up the title he had acquired by giving notice of it to the wharfinger. But this is quite immaterial when a man has got both the right of property and the right of possession, passing by a symbol, the bill of lading, which is at once both the symbol of the property and the evidence of the right of possession. When his title is thus complete, there is no obligation on him to give notice to any one. There was, therefore, no laches on his part, nor was there any ground of complaint that he failed in ordinary prudence, or that he did not in law and equity complete his security.

That being the state of the case, *Meyerstein* had a perfect right to the property. He had a perfect right to possession, and the moment the freight was paid, the wharfinger became the agent of the person who was entitled in law to the property and to the possession as soon as the obstacle existing by non-payment of the freight had been removed. There can be no doubt, therefore, that the wharfinger held, first, for the shipowner, and subject to his right, and from and after payment of the freight he held on behalf of *Meyerstein*, the legal owner. It is unnecessary to repeat what has been so well said by my noble and learned friends who preceded me, but I was anxious to shew by these few remarks

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that I heartily concur in the principles which they have laid down.

LORD COLONSAY:—

My Lords, the grounds of the judgment, concurring with the judgments given in the Courts below, have been so fully stated, that I have only to add my concurrence in them.

Judgments of Court of Common Pleas and of Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Lords' Journals, 22nd February, 1870.

Attorney for the Appellant: *W. A. Crump.*
Attorneys for the Respondent: *Thomas & Hollams.*

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June 24.
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Feb. 18;
April 4.

THE ATTORNEY-GENERAL . . . . . PLAINTIFF IN ERROR;

AND

THOMAS DAKIN, ROBERT BESLEY, AND OTHERS . . . . . DEFENDANTS IN ERROR.

Royal Palaces—Sheriff's Levies.

22 Ch D 318
33 L 2 8
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There is a distinction between a royal palace and a royal palace which is also a royal residence.

Hampton Court Palace is a royal palace, but not a royal residence, and therefore is not exempt from execution, within it, of civil process.

The Sovereign does not, in fact, reside there; and the circumstances that the chief officials and the chaplain, together with the housekeeper and the gardener, are all appointed by the Crown, and paid out of the civil list—that a pew is always kept in the Chapel ready for the royal use—that certain apartments there are known as "State Apartments" (though now used by Her Majesty's permission as picture galleries, in which pictures, the property of the Crown, are exhibited to the free inspection of the public)—that a guard of honour is always posted there—that the inmates, to whom the Sovereign has graciously granted the use of apartments, hold such apartments entirely at the pleasure of the Crown, and could be displaced at a moment's notice—and that the grapes grown in the Vinery are always kept for the service of

Her Majesty's table, do not constitute it a royal residence, so as to confer the exemption upon it. *Per* LORD CHELMSFORD and LORD COLONSAY; *diss.* THE LORD CHANCELLOR (Lord *Hatherley*).

Where, therefore, a *fi. fa.* had been levied in some of the apartments in the Palace: *Held*, that the sheriff was not liable to an information for intrusion.

THIS was an Information of Intrusion brought by the Attorney-General against the Defendants, the sheriffs of *London* and *Middlesex*, and their officers, for an intrusion into Her Majesty's Palace of *Hampton Court*, committed by them for the purpose of executing a writ of *fi. fa.* against the goods of Lady *Henry Gordon*, the wife of a defendant in a civil action. The facts were turned into a Case, which stated, in substance, that *Hampton Court* was built by Cardinal *Wolsey* in 1514, and presented by him to *Henry* VIII. in 1525; it had then become, and had ever since remained, a royal palace. Up to the tenth year of the reign of *George* II. it had been actually occupied by the reigning Sovereign; but after that period it ceased to be so. It contains, however, many rooms called "The State Apartments," which are filled with pictures belonging to the Crown, to the exhibition of which the public have now free access, though a fee was formerly paid by visitors to "the housekeeper." A guard of honour is always on duty at the Palace, and sentinels are posted at various entrances. Divine service is regularly performed at the Chapel Royal there by a chaplain, appointed under the Lord Chamberlain's warrant, who receives a salary from the privy purse, besides contributions from the occupants of the Palace, and who has apartments there regularly assigned for his residence. The Sovereign has also a pew in the chapel, and this pew was used a few years ago by His Royal Highness the Prince of *Wales*, while he resided at the *White Lodge, Richmond*. The Palace Gardens are kept in order by the Crown, and the grapes grown in the Vinery are regularly forwarded to the Queen for the use of Her Majesty's table. The gardener and his assistants are appointed by the Lord Steward, paid out of the civil list of his department, and have residences assigned them in the Palace. There is a "Master" of the Tennis Court, appointed under the royal warrant and a patent issued thereon.

There are other apartments in the Palace which are in the

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occupation of private individuals, not enjoyed as official residences, but occupied under a grant or warrant of the Lord Chamberlain of the Household. These apartments are suitable for the residence and accommodation of persons with considerable household establishments. They are occupied by persons to whom they have been assigned by favour of the Crown. In the case of Lady *Henry Gordon* the warrant was in the following form:—"These are to require you to deliver, or cause to be delivered, unto the Lady *Henry Gordon* the keys and possession of the following lodgings in Her Majesty's Palace of *Hampton Court*, late in the possession of the Lady *Albinia Cumberland*, deceased, viz." [describing them], "which lodgings are to be inhabited by the Lady *Henry Gordon*, or some part of her ladyship's family, a part of every year, or they will be considered vacant, and disposed of accordingly; and when the family are absent, it is expected that one of their servants shall be left in the lodgings, or that they will leave the keys thereof with you, or the housekeeper for the time being: and for so doing this shall be your sufficient warrant. Given under my hand and seal, this 8th day of October, 1850, in the fourteenth year of Her Majesty's reign. *Breadalbane* (L.S.) Lord Chamberlain." This warrant was addressed to the housekeeper of the Palace.

These occupiers provide the household furniture and fixtures necessary for the occupation of the apartments. The needful repairs of the apartments, before occupation entered on, are done at the expense of the Crown, others at that of the occupiers; but afterwards the internal works, alterations, and repairs are done at the expense of the occupiers alone; but no works are permitted to be done except under the authority and direction of the Board of Works, and the Government contracting tradesmen are always employed. Many apartments occupied by private individuals communicate with the State Apartments; the doors of communication are, as a rule, kept locked during such occupation, but the housekeeper possesses the power and authority to open them, and pass through the apartments, when she deems it necessary. Some of the apartments have exclusive outward entrances opening upon the public high road and barge walk. The apartments are occupied only during the pleasure of the Sovereign, and the occupants

are removable at any moment. Process of this sort had never, in fact, been before executed in the Palace.

The question for the opinion of the Court was, whether the Defendants were justified in executing the writ within the precincts of the Palace of *Hampton Court.*

The Barons of the Exchequer differed in opinion; Lord Chief Baron *Kelly* holding the negative, and Mr. Baron *Martin* and Mr. Baron *Bramwell* the affirmative (1). The case was then taken to the Exchequer Chamber, where it was heard by Mr. Justice *Willes,* Mr. Justice *Blackburn,* Mr. Justice *Keating,* Mr. Justice *Mellor,* Mr. Justice *Smith,* and Mr. Justice *Lush,* who being equally divided in opinion, the judgment of the Court below stood affirmed (2). This proceeding in Error was then brought.

The Judges were summoned, and Mr. Justice *Blackburn,* Mr. Justice *Mellor,* Mr. Justice *Keating,* Mr. Justice *Brett,* and Mr. Baron *Cleasby* attended.

The *Attorney-General* (Sir *R. P. Collier*), and Sir *J. B. Karslake,* Q.C. (Mr. *Patrick McMahon* was with them), for the Plaintiff in Error:—

The act of intrusion into a royal palace was an offence at common law. Lord *Coke* (3) puts it under the head of misprision; and, among other places where such an offence could be committed, he mentions *Westminster Hall,* which had, long before his time, ceased to be an actual royal residence. Yet it is the fact that the Sovereign no longer actually resides at *Hampton Court Palace* which is now set up as the justification of the intrusion here. But it is clear that residence cannot mean the actual personal presence of the Sovereign, for if so, the moment Her Majesty left one of her royal palaces the place would cease to be a royal palace, though it would resume that character on the instant of her return. Such a constantly varying condition of things cannot be assumed as the ground for a legal decision. A royal palace must be a place which has once acquired that character, and to which, whether at the moment actually residing there or not, the Sovereign has the power at once to return. The first case on this subject is that of *Elder-*

(1) Law Rep. 2 Ex. 290. (2) Law Rep. 3 Ex. 288.
(3) 3 Inst. c. 65, p. 140.

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ton (1). That cannot decide the present. There the question was, whether the Board of Green Cloth could commit a man, as for contempt, for executing a *fi. fa.* within the limits of the Palace of *Whitehall*, where that Board held its sittings, and the Court of Queen's Bench, under the direction of Lord Chief Justice *Holt*, held the committal wrong, but not on the ground that the place was no longer the actual residence of the Sovereign, but on the ground of defect of power in the Board of Green Cloth, and the fact that Her Majesty did not occupy the place by herself, or by her officers or servants, or, indeed, in any way whatever. The real question there being as to the power of the Board of Green Cloth, the other matters discussed were only incidental to it. A more modern case is directly in point. In *Winter* v. *Miles* (2) the question arose whether *Kensington Palace* was a royal palace, and, as such, exempt from liability to service of process, and it was held to be so, because, though the Sovereign never actually resided there, apartments existed on the use of which he could at any time enter, a guard of honour was always posted there, and servants of the Sovereign were there. A member of the royal family was, by permission of the Sovereign, resident in the Palace. In that case *Elderton's Case* (1) was fully considered. Lord *Ellenborough*, in an elaborate judgment, went through all its facts, and referred to the various books in which reports of it were contained. In *Winter* v. *Miles* (2) there was no actual personal residence of the Sovereign, but he was deemed to be present there by his officers and servants; and the special character of the place was held to be preserved by the existence of state apartments, always capable of being made ready for his reception, by the constant presence of a guard of honour, and by the fact that the fruit from the garden was always kept for the use of His Majesty's table. All these facts exist in the present case. In *Elderton's Case* (1) not only was there no actual residence of the Sovereign at *Whitehall*, but these various facts were all wanting to shew that *Whitehall* continued to preserve the character of a royal palace. In the argument in *Elderton's Case* (1) Mr. Attorney-General *Northey* quoted the case of

(1) 2 Ld. Raym. 978; 3 Salk. 91, 284; 6 Mod. 73; 1 Holt, 590.

(2) 10 East, 578. See also a summary of it, 1 Camp. 475, n.

one *Jones*, to shew that though the *Tower* was no longer an actual residence of the Sovereign, it still retained its ancient characteristics, and that one *Burchett*, who had committed a murder there, had had his right hand cut off, before he was executed, on that very account. Lord *Holt* said that the right hand had been cut off before execution, but that he could find no entry of judgment to that effect. But upon the general question Lord *Holt* expressed a clear opinion that a palace continued to bear that character so long as it was occupied by the King's officers and servants. It is so here, as the statements in the case fully prove. As to the occupation here by private persons, it is entirely at the pleasure of the Crown, and can be terminated in a moment by the Crown. There are State Apartments in the Palace, and Her Majesty can return to them at any instant that she so pleases. The royal property, the pictures, are kept there, and the guard of honour is there. These are undoubted emblems of the royal occupation, and in such a case as this continuous or even frequent personal residence is not necessary. The Courts cannot inquire whether there is any *animus revertendi* in the Sovereign. Nor can the facts that carpets are not laid down, nor bed hangings put up, affect the question. The Queen is in possession of the Palace by her officers, her soldiers, and her servants; and so long as a portion of the Palace is available for her immediate residence, as it is here, it does not matter that, out of her grace and favour, she allows private individuals to occupy the rest. Their occupation is not a tenancy, but simply an occupation *de facto* at the will and pleasure of the Crown. It may be put an end to at any moment, and in that way the Crown retains an absolute power over the apartments. The presence of these occupants there is therefore not incompatible with the residence of the Crown, which might at any moment be resumed, not only as to the State Apartments, but even as to those now used under "the pleasure of the Crown" by these private individuals. There is not a suggestion that there ever has been any act of the Sovereign amounting to a declaration that *Hampton Court Palace* is not to continue one of the royal residences. If so, then having once enjoyed that character, it continues to possess it. In the case of *Earl of Strathmore* v. *Laing* (1) the Palace of *Holyrood* was declared

(1) 2 Wils. & Shaw, 1.

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in this House a royal palace, yet the Sovereign had not actually resided there for nearly two centuries; and though the holding there of courts by *George* IV. was spoken of when the case was before this House, those courts really were not held there till two years after the events which gave rise to that case, and till some time after the decision in that case had been pronounced in the Court below. So in *Attorney-General* v. *Donaldson* (1), where the question arose on the powers of the Commissioners of Sewers, it was held that the Palace at *Kensington* was a royal palace. Mr. Baron *Alderson*, in giving the judgment of the Court there that the plea could not be allowed to be amended, says: "In point of fact there can be no doubt that it is the residence of the Sovereign. Her Majesty has a right to go and live there, and there is no one who could resist her demand to take up her abode in the Palace." It is true that the case of *Reg.* v. *Lady Emily Ponsonby* (2) decided that the occupier of rooms in *Hampton Court Palace* was rateable to the poor, but that decision depended on the provisions of the poor law statutes as to an occupation being beneficial to the person rated, and did not in the least degree affect the character of the place. It only decided that if there was a beneficial occupation, which there was, it rendered the occupier liable to contribute to the poor rates. *Hampton Court* having once been a royal palace, and having now all the incidents of a royal palace belonging to it, the Defendant must shew it to have been abandoned as such, or the judgment in this case must be for the Crown.

Mr. *Quain*, Q.C., and Mr. *J. C. F. S. Day*, for the Defendant in Error:—

There is no legal principle which requires *Hampton Court* to be treated as a royal palace for a purpose like the present. What was the principle on which such a character was attached to a particular building was distinctly stated by Lord *Gifford* in advising this House in the case of *Earl of Strathmore* v. *Laing* (3). It was this: that the Sovereign should not be exposed to the annoyance of having process served in his residence. That principle cannot

(1) 10 M. & W. 117. (2) 3 Q. B. 14.
(3) 2 Wils. & Shaw, 1.

apply to *Hampton Court*, where the Sovereign never resides. It matters not whether the persons occupying apartments at *Hampton Court* are lessees, or assignees, or licensees; they are persons in occupation of the place, and there are no apartments whatever ready for the immediate occupation of the Sovereign. It cannot be assumed that the Sovereign will expel these occupants at a moment's notice. *Hampton Court* was once, like *Greenwich* and *Whitehall*, a royal residence, but it has long since been appropriated to other uses, and has ceased to be a royal residence, exempted as such from visits by the ordinary officers of the law. The privilege attaches not to the building, but to the person of the Sovereign, and even the case of *Winter* v. *Miles* (1) shews that. That case was decided on the ground that there were apartments in the Palace ready at any moment for the reception of the Sovereign. It is not so here. The *dictum* of Mr. Baron *Alderson* in *Attorney-General* v. *Donaldson* (2), that in point of fact there can be no doubt that *Kensington Palace* is a residence of the Sovereign, is of doubtful authority, and at best is a mere *dictum*. But whether right or wrong it does not affect this case. Had that case been tried before a jury the question would have been, what constituted residence, and trying this case on that question it is impossible to say, in any way, that the Sovereign resides at *Hampton Court*. The occupants here keep their own servants, do their own repairs, and though the Crown, no doubt, could turn them out of occupation at any moment, yet so long as they do occupy, and the Crown does not turn them out, but allows them to continue in occupation, *Hampton Court* cannot be described as a royal residence. The payments made to certain official persons at *Hampton Court* are not sufficient to give the place the character of a royal residence, and without the residence of royalty there is no such exemption as that now claimed. The only persons at *Hampton Court* who can be said to be in the service of the Crown are the chaplain, the housekeeper, and the gardener. But they cannot be called the domestic servants of the Sovereign, occupying the place in that character. They may be called vaguely servants of the Crown, but they are not part of the personal establishment of the Sovereign, of whose services the Queen ever availed herself, and as

(1) 10 East, 578. (2) 10 M. & W. 117—125.

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to whom any interruption of their services could be treated as a personal annoyance to the Sovereign.

Sir *J. Karslake*, in reply:—

There is a great distinction between *Greenwich Hospital* and *Hampton Court Palace*. The Lord Chamberlain has no control over the former, he has over the latter, and he is for such a purpose the personal representative of the Sovereign. The cases of *Kensington* and *Holyrood Palaces* govern the present. To apply a different rule would be to declare that when the Queen quits *Windsor Palace* for a time, and allows the public to visit the royal apartments, and to see the pictures, *Windsor* ceases to be a royal palace, though it resumes that character the moment Her Majesty personally re-enters it. Lord *Coke* says (1), that the privilege extends "to all the King's palaces where his royal person resides," which cannot mean actual presence, since the actual presence of the Sovereign in all the royal palaces at once is an impossibility. It means those to which he can resort at his pleasure.

THE LORD CHANCELLOR proposed the following question for the Judges:

"Whether, on the facts stated in the special case, a writ of *fieri facias* can lawfully be executed within the precincts of the Palace of *Hampton Court?*"

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Feb. 18. MR. BARON CLEASBY:—

My Lords, the facts of this case have been so clearly brought before your Lordships in the case itself, and in the judgments of the learned Judges in the Courts below, that it is unnecessary to recapitulate them. The answer to your Lordships' question depends altogether upon what is the proper inference or conclusion to be drawn from these facts. For it is not contended either, on the one hand, that the exemption claimed belongs to the place itself, except so far as it is connected with the person of the Sovereign; or, on the other hand, that in order to give the exemption the Sovereign must be personally present or actually residing in the place.

(1) 3 Inst. c. 65, p. 141.

Your Lordships were not asked to consider this case as if the question was entirely a new one, or to overrule the adjudged cases, which, indeed, could hardly have been done, as one of them (*Earl of Strathmore* v. *Laing* (1)) was decided in your Lordships' House, but rather to apply the principle derived from them to the present case. And I take that principle to be, that if such a place as *Hampton Court Palace*, with its garden, galleries, and other appurtenances, is really kept up and maintained as a royal residence for the Sovereign, then the process of the law could not be lawfully executed there.

No one contends that the actual intention of the Sovereign at any particular time to reside there would be the test, or even could with propriety be inquired into, or that the absence of the Sovereign for any length of time would be decisive. No doubt the fact of the Palace being kept in a condition fit for the immediate return of the Sovereign would make the case a simpler one. At the same time, many cases might be put—for instance, extensive alterations and repairs—where return might be impossible for years, and still it would continue a royal residence.

On the other hand, its being applied permanently to purposes wholly inconsistent with its being the residence of the Sovereign, would lead strongly to the opposite conclusion.

The real question, therefore, seems to be the same as was put by Lord *Ellenborough* to the jury with respect to *Kensington Palace* in *Winter* v. *Miles* (2): Is *Hampton Court Palace bonâ fide* a royal palace? that is, a royal palace for the residence of the Sovereign. Upon the conclusion of fact which answers this question there has been an unusual difference of opinion among the Judges of the Courts below. I have, therefore, distrusted the first impressions raised in the mind by the facts stated, and endeavoured to examine and correct them, and in the result have come to the conclusion that *Hampton Court Palace* must be regarded as maintained and kept up by the Sovereign as one of the royal residences.

I am quite aware, from what has been already said with so much force by the Judges who have expressed an opposite opinion, that strong reasons may be urged against this conclusion; but they are, I think, outweighed by the reasons in favour of it, and, perhaps,

(1) 2 Wils. & Shaw, 1. (2) 10 East, 578.

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upon examination are not so strong as they at first appear. Take the principal one, viz., the suffering a number of persons to have a sort of independent occupation of so many apartments. This might show, no doubt, that it is not the immediate intention of the Sovereign to take up her abode there (which is confessedly not the real test); but does it shew that the Sovereign has abandoned the object of retaining and keeping it up as one of the residences to which she or her successors might return, or where the members of her family might, with her permission, reside? Taken by itself it might go a great way to that conclusion. But it must not be taken by itself; it must be taken in connection with the other circumstances of the case; and those other circumstances negative such a conclusion. It certainly strikes me that the fact relied on could not exist in the manner and under the circumstances under which it does exist, unless *Hampton Court* was regarded as one of the royal residences. Of course a building, even a palace, might be parcelled out among various persons; and if there was nothing more, no one could suppose—certainly the inmates themselves could not suppose—that they were occupying one of the residences of the Sovereign.

As regards the inmates of *Hampton Court Palace* the case is quite different. They are constantly reminded that by the bounty and favour of their Sovereign (and for reasons, perhaps, of which they may be justly proud) they are permitted to occupy one of her residences. They are reminded of it by the guard of honour always on duty—by the gardens and grounds, kept up by her with royal magnificence, and used by her so far as they can be, when away—by her chapel, where she and her court might at any time occupy the place assigned to them—by the royal gallery, to which her subjects are admitted in her absence—and by the whole place being under the care of her servants and officers. Under all these circumstances the use that is made of the Palace is derived from its being a royal residence, and without that condition the facts as they stand could not, in my opinion, exist.

No one, I should think, would venture to say that *Hampton Court* was kept up as it is simply because certain persons are permitted to have apartments there, or that it is kept up as it is, as a royal picture gallery, or a fine garden; and the only reason-

able conclusion is, that it is kept up as it is as a royal residence. That is its permanent and principal character and object. Any other uses that are made of it, being transient and subordinate, form insufficient grounds of decision.

I therefore think that the process could not legally be executed within the precincts of the Palace, and answer your Lordships' question in the negative.

MR. JUSTICE MELLOR:—

My Lords, in answer to your Lordships' question, I beg to state my opinion that a writ of *fieri facias* can, under the circumstances stated in the special case, be executed within the precincts of *Hampton Court Palace.*

I was one of the Judges sitting in the Court of Exchequer Chamber when this question was argued there, and my judgment is reported (1). The farther argument before your Lordships has still more strongly convinced me that the judgment which I before expressed was well founded. Referring to the expressions of Lord *Ellenborough* in stating the question for the jury in the case of *Winter* v. *Miles* (2), I ventured there to state the question thus: "Is *Hampton Court Palace bonâ fide* a royal palace? Of course, I do not mean, nor did Lord *Ellenborough* mean, a palace belonging to the Sovereign, and in that sense a royal palace; but I assume that Lord *Ellenborough* meant by the words *bonâ fide* a royal palace, a palace actually devoted to the use and enjoyment of the Sovereign, which, although she does not actually reside in it, is kept in such state and condition that there would be no obstacle to Her Majesty's immediate use of it, if it should be Her Majesty's pleasure to do so."

The authorities which were referred to in the argument appear to me to throw but little light upon the solution of the present question, other than by shewing upon what principle of law the immunity claimed for *Hampton Court* must rest. I think that all the cases, and the expressions of the Judges, tend to establish that the privilege depends, not upon the fact of its being a royal palace, but of its being a royal residence; that is, a palace in which the Sovereign does either actually reside, or which is kept

(1) Law Rep. 3 Ex. 291–2. (2) 10 East, 578.

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in such state and condition that there would be no obstacle to Her Majesty's immediate return to and occupation of it, if she were pleased to do so.

Lord *Coke* (1), in treating of the offence of striking in the King's Court of Justice, where the King is representatively present, as also in the King's palace, defines the palace which gives the character to the offence as a palace "where the King's royal person resideth." It is difficult to imagine that Lord *Coke* would have used the words "where the King's royal person resideth," if the like reverence had been due to every royal palace. It is manifest that it would be inconsistent with the dignity and comfort of the Sovereign, if officers of the sheriff were permitted to intrude therein, and execute process of execution against the goods and chattels of the officers or servants residing therein.

To every royal palace in which Her Majesty does reside, or which is really kept as a palace of residence for Her Majesty's use, the privilege does, in my opinion, extend. But I am equally well satisfied that the privilege does not attach to palaces which have, by acts entirely inconsistent with any present intention of residence, ceased to be in any proper sense "palaces of residence." In other palaces, it was quaintly argued in *Elderton's Case* (2), "the Queen's honour is as much concerned that the process of the law should be duly executed as in the privilege of her palace." I confess that I am deeply impressed with the impolicy of converting a privilege which was intended to apply to the dignity and personal comfort of the Sovereign into an immunity for debtors who are neither servants nor officers of Her Majesty against the just claims of their creditors.

In the case of *Winter* v. *Miles* (3), which was decided in 1809, it was put by Lord *Ellenborough* as a question of fact to the jury; and it was upon the finding, and with a view to support it as depending upon a question of fact, that his observations, in delivering the judgment of the Court, were addressed. I cannot help thinking that it was arrived at with considerable hesitation and delay, for in a passage towards the close of his judgment, he said, "Had it distinctly appeared in evidence that the immediate per-

(1) 3 Inst. c. 65, p. 140. (2) 6 Mod. 74.
(3) 10 East, 578.

sonal residence of His Majesty was, by means of any occupation of the palace incompatible therewith, rendered impracticable, we might have formed a very different conclusion on the subject before us; and whenever a case so circumstanced shall occur, the Court will not feel itself bound by anything now laid down from directing a jury that the exemption in question ought in such a case to be disallowed." I am of opinion that the circumstances of the present case do clearly bring it within the very suggestion of the Court at the conclusion of the judgment in *Winter* v. *Miles* (1), inasmuch as they shew that by reason of the mode in which the palace is at present occupied, "Her Majesty's immediate residence is rendered impracticable."

The course of events and the influence of opinion appear to me necessarily to influence the judgment which ought to be drawn from facts like those stated in the special case; and I cannot help thinking that no jury at the present day would find that *Hampton Court Palace* is *bonâ fide* a royal palace within the meaning of Lord *Ellenborough's* question in *Winter* v. *Miles* (1).

MR. JUSTICE KEATING:—

My Lords, in answer to the question put by your Lordships to the Judges, I am of opinion that, upon the facts stated in the special case, a writ of *fieri facias* cannot be executed within the precincts of *Hampton Court Palace* without the permission of the Lord Steward or other proper officer of Her Majesty's household.

It may, I think, be taken as established, that the continued personal residence of the Sovereign is not necessary in order to preserve to a royal palace the privilege of immunity from the execution of civil process within its precincts. Lord *Coke*, indeed, uses the expression that the privilege is appropriated "to all the King's palaces where his royal person resides." But, looking to subsequent authorities, it seems clear that a constructive residence, as distinguished from an actual and personal residence on the part of the Sovereign, is sufficient to preserve the privilege. In *Elderton's Case* (2) Lord Chief Justice *Holt* is supposed to have held the contrary; but when the different reports of that case are

(1) 10 East, 578.

(2) 2 Ld. Raym. 978; 3 Salk. 91, 284; 6 Mod. 73; 1 Holt, 590.

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examined it will be found that, although he certainly expressed a doubt whether *Whitehall*, which had been destroyed by fire seven years previously, could still be considered entitled to the privilege of a royal palace for want of the personal residence of the Sovereign, yet he did not give any opinion to that effect, but, on the contrary, seemed to think towards the end of the case that the Sovereign might reside, not only personally, but by means of "her court," "her officers," or "her domestics." The rest of the Court of Queen's Bench (Mr. Justice *Powell*, and two other Judges) thought the privilege, even in the case of *Whitehall*, still continued.

But any difficulty that might arise from a doubt expressed by so great a Judge as Lord *Holt* is now completely removed by the cases of *Winter* v. *Miles* (1), and of the *Earl and Countess of Strathmore* v. *Laing* (2), which shew clearly that no length of time during which the Sovereign is personally absent will take away the privilege from a royal palace, provided only it continues to be occupied by the Sovereign as a royal palace, with the power of returning at any time to reside therein personally.

In *Winter* v. *Miles* (1) it was held that *Kensington Palace* retained its privileges as a royal palace, although the Sovereign had not resided there personally for more than forty years, and parts of it were occupied by several private families by permission of the sovereign. It is true that some of the apartments were occupied by the Duke of *Sussex*, and that is supposed to be a material circumstance; but, as the Lord Chief Baron observed in his judgment in this case in the Court below: "It surely can make no difference whether a suit of apartments which Her Majesty is pleased to allow one of her subjects to reside in is occupied by a prince of the blood who has an income and an establishment provided for him by Parliament, or by a nobleman or gentleman and his family upon whom the Queen may have been pleased to confer the same favour."

To this might, perhaps, be added that, as the dispossession of the royal duke would have been necessary in order to enable the Sovereign to reside personally at *Kensington Palace*, the Duke's occupation rendered such residence more improbable than if the apartments had been inhabited by a less illustrious visitor.

(1) 10 East, 578. (2) 2 Wils. & Shaw, 1.

The next case in which the question arose (as far as I have been able to discover), was the case of *Batson* v. *M'Lean* (1). There the deputy major of the *Tower* had been arrested on a *capias*, and an application was made to the Court of King's Bench to discharge him out of custody,—on the ground, 1st, that his arrest took place within the precincts of the *Tower*, and as the *Tower* was a royal palace the writ could not be executed within its precincts; 2nd, that, whether the arrest took place within the *Tower* or not, still he had a personal privilege *redeundo* from the discharge of his official duties. Queen *Elizabeth* was the last Sovereign who resided in the *Tower* personally; but the affidavits relied on a continued occupation by the King's servants (namely, the yeomen of the guard); they did not, however, shew clearly that the arrest was made within the precincts. The rule, therefore, was granted on the second point only; but Lord *Ellenborough* is reported to have said: "If it had been within the *Tower* there could be no doubt but that the arrest would have been wrong." This, if correctly reported, although not a decision, would shew the impression remaining on the mind of Lord *Ellenborough* after the case of *Winter* v. *Miles* (2), which had been cited in support of the application.

The case of *Earl of Strathmore* v. *Laing* (3) is one of the greatest authority upon this subject, being a decision of your Lordships' House. In that case process had issued against the goods of the Appellants in *Holyrood Palace*, where they had been permitted to reside by the Sovereign. The Palace itself, which was situated within the sanctuary of the Abbey of *Holyrood*, had not, in 1820, when the process issued, been the personal residence of the Sovereign since the union of the two crowns, but it had always been kept up as a royal palace under the control of the Sovereign, who occasionally allowed distinguished persons to occupy portions of it. A guard of honour mounted at the Palace, and paid servants of the Sovereign lived in and controlled it. The Judges in *Scotland* held that, under the circumstances of the case, the process might be executed against the goods of the Appellant, though within the Palace.

According to the report of the judgments in the case, which is very meagre, it is not easy to discover upon what precise grounds

(1) 2 Chit. Rep. 51. (2) 10 East, 578. (3) 2 Wils. & Shaw, 1.

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they proceeded. Some of the learned Judges seem to have considered that it was only the execution of process against *the person*, and not against *moveables*, that would constitute a violation of the privileges of a royal palace, and, farther, that such was the law in *England*. Some thought the execution legal because the consent of the proper officer had been obtained; and that was one of the principal grounds upon which the judgment of the Court of the First Division proceeded. Lord *Robertson* was of opinion that the privilege was confined to the actual residence of the Sovereign, whilst the Lord Justice Clerk considered the case very similar to that of *Kensington Palace;* so that Lord *Gifford* well observed, whilst delivering his opinion in your Lordships' House, that the Second Division of the Scotch Judges "entertained sentiments different from what had led to the judgments," and the judgment of the Court below was accordingly reversed.

The authority of this case, as bearing on the present, has been supposed to be weakened by the fact that in October, 1822, and before the appeal was heard, His Majesty King *George* IV. had visited *Holyrood*, and held his court there. But this circumstance, although it is certainly alluded to in the judgment of Lord *Gifford*, formed no part of the ground upon which it proceeded. The question before your Lordships was, not whether *Holyrood* was a palace entitled to the privilege at the date of the appeal, but whether the diligence of the Respondent *Laing* could have been lawfully executed in 1820. And that this was so, the judgment of Lord *Gifford* puts beyond a doubt: "The question is," said his Lordship, "whether *Holyrood Palace* is not to be considered a royal palace; and if so, whether this privilege, *which attaches not to the person or goods, but to the place*, should or does afford a protection against the diligence complained of, *although the King may not have resided there for a great many years*." The only importance of the Sovereign's subsequent visit was to shew that it is not always safe to assume that a royal palace, kept up as such, may not be visited by the Sovereign, however long the period of personal absence may have been.

So in the case of *Attorney-General* v. *Donaldson* (1), which was an information of intrusion for unlawfully entering *Kensington*

(1) 10 M. & W. 124.

Palace, a doubt was suggested whether stating the Palace to be "in the occupation of our Lady the Queen, was a sufficient averment of *residence*. But upon an application by the Defendant to be allowed to amend his plea, so as to raise the question, the Court refused to allow it, Baron *Alderson*, with the consent of the other Barons, saying: "When this case was argued the Court entertained some doubt whether it sufficiently appeared on the face of the information that *Kensington Palace* was the residence of the Sovereign, but we cannot allow an amendment of the plea, because, in point of fact, there can be no doubt that it is so. Her Majesty has a right to go and live there, and there is no one who could resist her demand to take up her abode in the Palace."

Upon these authorities, therefore, the question seems to be, has *Hampton Court Palace* (although not occupied for a length of time by the Sovereign personally) been kept up as a royal palace, with the power, on the part of Her Majesty, at any time of returning to reside there if minded so to do? And I find it impossible, upon the facts stated in this case, to distinguish it *in any material particular* from those which have been already decided.

It has been contended that the facts stated in this case shew that the Sovereign has abandoned all intention again personally to reside at *Hampton Court Palace;* and the number of persons allowed to occupy apartments, the state of the furniture, &c., are relied upon as shewing the absence of any such intention. But, as Lord *Ellenborough* said in *Winter* v. *Miles* (1), "such an inquiry might include in its discussion many extremely delicate circumstances;" and it may be added that, as a test, it would be most difficult to be applied, and most fallacious in its application. When *Laing*, in 1820, attempted to poind the pictures of Lady *Strathmore* in the Palace of *Holyrood*, who supposed that within two years the Sovereign would visit it? If it had then been made a question, the same facts would have been appealed to as now, and with much greater effect, to shew its improbability—the necessity for displacing the licensees, the quantity of upholsterers' work that would be required, and the like; and yet, notwithstanding those apparent obstacles, the visit actually took place. So, likewise, in the case of *St. James's Palace*. Considering the immediate neighbourhood of

(1) 10 East, 578.

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Buckingham Palace, the improbability of a Sovereign again residing in *St. James's Palace*, in the sense of living and sleeping there, is much greater than a return to reside at *Hampton Court*. Yet it would be difficult to contend that *St. James's Palace* has therefore lost its privileges, even though licenses to occupy apartments within it may have been given.

It appears to me, therefore, that probability of the intention on the part of the Sovereign again to reside can never be the test in such a case as this. The inquiry, even if seemly, would never be satisfactory. But it is the keeping up the Palace as a palace, whether more or less furnished, with the retention of the control over it, and the power of returning at any time to reside in it, if so minded, that seem to form the only inquiry which can be properly and satisfactorily made with a view to solve the question. And, judged by this test, I do not see how the privilege accorded to *Kensington* and *Holyrood* can possibly be denied to *Hampton Court Palace*. A guard of honour is always on duty at the Palace; divine service is regularly performed in the Chapel Royal therein by a chaplain, not with "some endowment," as my Brother *Martin* supposed in his judgment, but appointed and paid by the Crown, and who has apartments in the Palace; the royal pew or closet maintained in the Chapel Royal, and used by the heir apparent a few years since; at the demise of the Sovereign or consort, an achievement of the royal arms affixed to the Palace; the Palace and gardens maintained and kept in order by the Crown, and the fruit forwarded for the service of Her Majesty's table; the Queen's gardener and assistants appointed by the Lord Steward, and occupying official residences in the Palace; the State Apartments, containing a collection of pictures, the property of the Crown, under the care of Her Majesty's servants, the chief of whom has control over, and access to, all parts of the Palace; sentinels posted at the various entrances, and those entrances opened and closed at the pleasure of the Crown; the officers and servants of the Crown attached to and residing in the Palace, all paid out of the fund granted by Parliament expressly "for the support of Her Majesty's household, and of the honour and dignity of the Crown" (1 Vict. c. 2); and, in addition, the fact relied on by Lord *Gifford* in your Lordships' House in *Earl of Strathmore* v.

Laing (1) exists here, namely, that process had never before been executed within the precincts of the Palace.

It is difficult to see how the Sovereign could otherwise keep up a palace, as such, where there has been no actual residence for a great number of years, or how she could more decidedly preserve the control over and power to return to it at any time to reside if so minded. But Her Majesty has also been pleased to occupy a considerable portion of the Palace by allowing persons of rank and distinction, and others of respectable position, to reside there as her visitors (for in law they are nothing more), on certain conditions; and it is said that by giving such licenses to those persons, although revocable at any moment, Her Majesty has manifested an intention of never residing there herself, or, as more clearly put by my Brother *Blackburn* in his judgment in the Exchequer Chamber, that inasmuch as the immediate personal residence of the Sovereign could not take place "unless that permissive occupation was terminated in a manner legal, no doubt, but very ungracious," we ought not to impute to the Sovereign an intention to act in such a manner, but ought to infer as a fact "that the intention to preserve the power of immediately resuming actual personal residence at pleasure has been abandoned, and consequently that *Hampton Court* has ceased to be kept up as a royal palace in such a sense as to privilege its inmates from the execution of process there."

Now I confess I am unable to perceive how the intention to preserve the power of immediate return, if so minded, could have been more clearly manifested than by making the occupation that of visitors only; nor do I see how the termination of a permissive visit whilst the Sovereign was not actually residing in her palace would be "very ungracious," when a return to such residence became desirable. At all events I should think it would not be more "ungracious" to determine the visit of Lady *Henry Gordon* to *Hampton Court* if Her Majesty wished to reside there in person, than it would have been to remove the Duke of *Sussex* from *Kensington*, or Lady *Strathmore* from *Holyrood*. But it appears to me that such considerations can never form the ground for conferring or taking away a privilege, and that in fact the judgments against the privilege in the Courts of Exchequer and Exchequer Chamber

(1) 2 Wils. & Shaw, 1.

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are directed rather to shew that the decided cases ought not to have been decided as they were, than to distinguish the present case from them in any material particular. I say in any material particular, for I cannot think the presence or absence of a throne which had not been sat upon for forty years, or of beds which could not be slept in, or more or less furniture, can be material in the decision of a question like the present.

That *Hampton Court* continues to be a royal palace is not disputed. Then the only question is, to use the words of Baron *Alderson* before referred to, has Her Majesty a right to go and live there? And is there anyone who could resist her demand to take up her abode in the Palace? This seems a plain and intelligible ground to determine what is a royal residence to which the privilege attaches; whereas an inquiry into the intentions of the Sovereign to reside personally in her palace must always, even if not unseemly, be unsatisfactory. Whether some court physician might discover a peculiar salubrity in the air of *Hampton Court*, and whether it might not thereupon be Her Majesty's wish to reside there for a greater or less portion of the year, or the like, are matters upon which it would be very difficult even to speculate. But there can be no difficulty in saying that, if such were to be Her Majesty's wish, there is nothing to prevent her doing so.

A view was pressed in the Court below, though less strongly at your Lordships' bar, as if the privilege claimed were in some way for the benefit of the Sovereign, and in derogation of the rights of the subject. This appears to me to be a fallacy. The privilege is given, not for the benefit of the Sovereign, but of the public, who are interested in the preservation of the royal palace of the Sovereign from the probable scandals consequent upon the intrusion of sheriff's officers—such as a seizure of the property of the Crown, a necessity for interpleader, or the like. Nor is the privilege claimed the absolute exclusion of the sheriff's officers, but only that they should enter under such permission and control as would insure the execution of the process without the risk of scandals, which are considered offensive to the public;—a course, be it observed, more likely in most cases to accomplish the object of the creditor than that resorted to upon the present occasion, the inexpediency of which the facts stated in the case sufficiently demonstrate.

I ought, perhaps, to notice the case of *Reg.* v. *Ponsonby* (1), although it really does not involve the point now discussed. All that was held there was, that the occupation by the visitors in *Hampton Court Palace* was, whilst it continued, beneficial, within the meaning of the statute of *Elizabeth*, so long as the Sovereign did not actually reside. And the ground was stated by Lord *Denman* to be, that if the owner of premises goes abroad, permitting a friend to occupy under the superintendence of the domestics of the house during his absence, the friend and not the owner would be rateable:—a strong proposition undoubtedly, but not touching the present case. And as to the extra-judicial remarks by Lord *Denman* with reference to *Hampton Court Palace*, upon a case not so fully stated as the present, it is sufficient to say that even the counsel arguing against the Crown has not relied upon them.

For these reasons, I am of opinion, in answer to your Lordships' question, that, upon the facts stated in the present case, a writ of *fieri facias* cannot be executed within the precincts of *Hampton Court Palace* without the permission of the Lord Steward or other proper officer of Her Majesty's household. And in this opinion, as well as in the reasons upon which it is founded, Mr. Justice *Brett* entirely concurs.

MR. JUSTICE BLACKBURN:—

My Lords, in my opinion, on the facts stated in the special case, process can be executed within the precincts of *Hampton Court Palace.*

My reasons are as follows: I am of opinion that civil process cannot be executed within the precincts of a royal residence, without leave obtained from the Sovereign; and that for the reason stated by Lord *Gifford* in the *Earl of Strathmore* v. *Laing* (2), that "the privilege is given, not merely because otherwise the King might be deprived of the services of his domestics, but that it is not seemly that the royal palace or the royal presence should be exposed to be made a scene of disturbance and confusion." I still think, as I said in the Court of Exchequer Chamber, that this is correct, and that it shews that the foundation of the whole depends on the reverence due to the person of the Sovereign, and

(1) 3 Q. B. 14. (2) 2 Wils. & Shaw, 1.

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consequently that the test must be, not whether the spot in question is the *property* of the Sovereign, or in the occupation of the Sovereign, but whether it is the *residence* of the Sovereign. That this is so seems to me to be obvious, when it is considered that premises occupied by the War Office, or the Post Office, or the Admiralty are exempt from the poor-rate, on the ground that they are occupied by the Crown: see *Jones* v. *Mersey Docks* (1); yet common sense would revolt at the notion that process could not be executed in a barrack, or a post-office, or a dockyard. The reason of the distinction obviously is, that though those premises are occupied by the Sovereign through her servants, they are in no sense occupied as ancillary to her personal residence, and consequently that the execution of process there in no way exposes the Sovereign to the risk of disturbance inconsistent with the respect due to the dignity of the royal person.

In *Winter* v. *Miles* (2), Lord *Ellenborough*, in delivering the judgment of the Court of King's Bench, says: "The question was, whether *Kensington Palace*, as it is called, was, under all the circumstances of its present occupation, entitled to the exemptions and privileges which are allowed to belong to a palace in which the King resides." And I think that is and must be the question in all similar cases, and is of necessity one depending upon a question of fact, of more or less, and that from the facts in each case the conclusion is to be drawn whether the place in question is a residence of the Sovereign or not.

I quite agree in thinking that there may well be a residence of the Queen in which she is not personally present, but I do not think that the mere power to go to a particular house in the occupation of the Sovereign, and reside there, would by itself make it a residence. If any of the great houses held on lease from the Crown, such as, for instance, *Stafford House* or *Montague House*, were to fall out of lease, it would be quite in the power of the Sovereign for the time being to occupy it as a residence, and so convert it into a palace in which process could not be executed; just as *Henry* VIII., in 1525, converted *Hampton Court*, which had previously been the residence of a subject, into a royal residence, or, as in more modern times, *Buckingham House* became a royal

(1) 11 H. L. C. 443. (2) 10 East, 578.

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residence. But the mere power to make it a residence would not make it one. It would be necessary to shew that it was intended to be occupied as a residence for the Sovereign, and when that was done, it would, I apprehend, be privileged before the Sovereign actually entered its walls.

And I quite agree, that when once a palace has become a royal residence it *primâ facie* continues to be one till it is shewn to have ceased so to be. But I apprehend that it is incontestable that it may cease to be one, and that without the Sovereign having parted with the property or the occupation of it. I may illustrate my meaning by referring to what I believe are the facts as to *Stirling Castle* in *Scotland*. Whether I am quite accurate or not is immaterial, as it will do equally well for an illustration. *Stirling Castle* was unquestionably once a royal palace, and is still occupied by the Queen's servants, but occupied as a barrack. The room in which *James* II. stabbed the Earl of *Douglas* was, till a recent fire destroyed it, occupied, I think, as the quarters of an officer; and there was nothing that I am aware of to prevent the Queen, if she was minded to be content with the very limited accommodation which has sufficed for her ancestors, from sending that officer out and residing again where the ancient Kings of *Scotland* did for many years reside. Yet I think no one would doubt that *Stirling Castle* has for many years ceased to be a royal residence, and that civil process might be executed in the barracks at *Stirling* as freely as in those at *Knightsbridge*. Perhaps I am wrong in stating this so broadly, as I see reference is made to an irrelevant dictum, attributed to Lord *Ellenborough* by a reporter of no authority, to the effect that the *Tower* was still a royal residence. To my mind this is a *reductio ad absurdum*. The principle enunciated, so that, if followed out, it would oblige a jury to find as a matter of fact that Her Majesty in any sense resides in the *Tower*, must, I think, require qualification.

The question then arises, what is the test by which it is to be determined whether a place once occupied as a royal residence has ceased to be one. I think the test is exactly the same as would determine when a house newly fallen into the occupation of the Sovereign becomes a royal residence. When it is so occupied and kept in such a state as to shew the intention to keep it, so that the

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Sovereign could immediately come there and reside in person, if so minded, it ought to be considered a royal residence. When the place is alleged to be newly made a royal residence, the *onus* would be on those who asserted that such a change had taken place as to make it one. When it was admittedly once a residence, the *onus* is on those who assert that such a change has taken place that it has ceased to be so. But I think the test is the same. And, to borrow the language of Lord *Ellenborough* in *Winter* v *Miles* (1), as soon as such a use is made of the palace as to preclude or materially interrupt Her Majesty's return to it whenever she might choose to do so, the change is proved. I think that, under such circumstances, the proper inference is, that the intention to keep it ready for resuming immediate personal residence is gone. And I think that the very idea of residence requires such an intention; and I think this is still more clearly the case where the question is, whether it is such a residence as to make the execution of process there inconsistent with the respect due to the royal person.

I do not trouble your Lordships by again citing the very few cases bearing on the question, as they have all been repeatedly brought to your Lordships' notice, and I think are all quite in accordance with the reasoning which I have submitted to your Lordships.

It will be at once obvious from what I have said, that in my opinion the question, whether there is residence or not, is what may be called a fluctuating one, depending on more or less, and therefore a question of fact on the evidence, not of law, though the test as to what constitutes residence is a question of law. In the case stated, no power to draw inferences of fact is expressly given, but it would have been nugatory to submit such a case unless it was meant to give such a power; and it has been argued by every one on the supposition that such a power was implied. I refer to what I said in the Exchequer Chamber, repeating that my opinion is based chiefly on the extent of the occupation of the Palace by families who have their own furniture and their own establishments there, which, to borrow the phrase of my brother *Mellor* in the Exchequer Chamber, was, I think, "putting the

(1) 10 East, 578.

Palace to uses *practically* inconsistent with the personal residence of the Sovereign."

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1870. April 4. THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, in this case there has been a singular discrepancy of opinion amongst the learned Judges before whom it has come, at the various stages of the proceedings. The question is a short and simple one: Whether or not execution can be had by the way of *fieri facias* upon goods and chattels situate in rooms occupied by the permission of Her Majesty in the Palace of *Hampton Court?* On this question opinions have varied to this extent:—Certain persons executed a levy in this Palace. A proceeding by way of an information for intrusion was instituted against them. In the Court of Exchequer, before which the question first came, the Lord Chief Baron was of one opinion; he was in favour of a judgment for the Crown; the two learned Barons who sat with him, Mr. Baron *Martin* and Mr. Baron *Bramwell*, were of a contrary opinion. The decision, therefore, was against the Crown. The case then went to the Court of Exchequer Chamber, where also there was considerable difference of opinion; but the Judges being equally divided as to the finding in the Court below, the judgment was affirmed. The case then came up before this House, and upon the argument we had the assistance of some of the learned Judges who had before heard the case in the Court of Exchequer Chamber; and also of some who had not previously heard it. But I must take the result to be, that of the ten learned Judges who have pronounced an opinion upon this case, five have been of the opinion that the levy was justified, and five have been of the contrary opinion.

Now, my Lords, I am afraid, from what I can understand, that this difference of opinion still, to a certain extent, prevails as regards your Lordships' House. For myself, I certainly cannot help coming to the conclusion, simply on the ground of authority, which I think has really concluded the question, that the Crown ought to have judgment in this case. I say simply on the ground of authority, because although it is undoubtedly stated, and most clearly stated, by the learned Judges that the question is one of fact, yet that statement must be thus far modified—that in all

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the cases which have happened there has really been no dispute about facts. The case, therefore, is one of inference, to be drawn from the facts which, in each case, have been admitted to be beyond all possible dispute. There being no controversy upon the facts, the only question has been, what inference is to be drawn from them? It is admitted on all hands that no process can be had by way of execution in any palace which is a residence of the Sovereign; and the whole question turns upon what is the meaning to be attached to the word "residence."

Now, the opinions of Mr. Justice *Willes*, Mr. Justice *Keating*, and Mr. Justice *Montague Smith*, delivered in the Court of Exchequer Chamber by Mr. Justice *Willes*, so entirely represent the view which I myself take of this subject, that I shall have exceedingly little to do beyond stating what those opinions, very shortly expressed, were, and my reasons for adhering to the conclusion at which they arrived. Mr. Justice *Willes* says: "I will proceed to read the opinion of my Brother *Keating*, in which my Brother *Montague Smith* and myself agree. That *Hampton Court Palace* was a royal residence, and as such privileged from the execution of legal process within its precincts, seems clear from the cases. But it is said that the Sovereign having ceased for a century or more to reside there personally, and the arrangement of the place being such as to make it unsuitable for the immediate personal residence of the Sovereign, the privilege of exemption now claimed has ceased to exist. The privilege, no doubt, was originally established by law; in order not merely to avoid personal annoyance to the Sovereign from the execution of process where he himself was personally present, but also the scandal consequent upon such execution within the precincts of a royal palace. Therefore, the authorities have not confined this privilege to places where the Sovereigns have been in actual residence, but have extended it to such royal palaces still retained under the care and control of the Sovereign, where the occupation is such that personal residence could at any time be resumed. The cases of *Kensington Palace* and *Holyrood Palace* fully sustain this view, and, we think, govern the present case. Whatever the decision might have been had the matter been *res integra*, we are of opinion that it cannot be substantially distinguished from those cases."

That is the substance of the conclusion which I myself have arrived at, that, after the case of *Kensington Palace*, and more especially the case of *Holyrood Palace*, which was a decision of this House upon circumstances which seem to me to have been less strong in favour of the privilege than the circumstances of *Hampton Court Palace*, I conceive myself bound now by these authorities, and I am happy also to concur in the remark which those learned Judges make, "that the existence of this privilege is not likely to lead to injustice or inconvenience, as an application to the Lord Steward, or other proper officer of Her Majesty's household, would always obtain a remedy for a creditor, either by a permission to execute process within the Palace, or by insisting on the prompt discharge of the debt as a condition to the enjoyment of the Sovereign's bounty." That course I have no doubt would be taken in any proper case; and therefore the privilege is not, as it has been supposed by some of the learned Judges to be, an invidious privilege, throwing upon the Crown, as it were, the office of protecting a debtor who has made default in satisfying his just debts. No such odious office is by any means cast upon the Crown, but the simple question is, whether on the one hand execution shall be had against a debtor without any permission of, or notice to, the Sovereign, and in such a state of circumstances as to render it possible that a scandal may be occasioned by an execution taking place in the very presence of the Sovereign herself, or, on the other hand (as was noticed by one of the learned Judges) by an interpleader upon the question, whether the chattels were the property of the Sovereign, arising upon the seizure of the goods. I apprehend, therefore, that the question we have to consider is this, whether or not the cases which have been decided, especially those of *Kensington Palace* and *Holyrood Palace*, are cases so identical in their circumstances, or, as I think, are so much weaker in the circumstances constituting the ground of the assertion of the privilege, that we ought to consider *Hampton Court Palace* as a privileged palace.

It is to be remarked that, as is stated in the case, no execution has ever been had upon chattels in *Hampton Court Palace*, a circumstance which I think it is by no means immaterial to observe; and although execution against the person has been had, it has

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not been had in such a manner as to be brought at all to the knowledge of any of those persons who might have interfered to prevent such execution. I think, therefore, it may be safely assumed that such execution as is said to have been had, has not been such as to have called attention in any way to the subject—no notice having been taken of the parties concerned in the execution, and no knowledge (as is stated expressly in the case) has been brought home to any persons who might have interfered on the part of the Crown. It must be considered, therefore, that the present case is one of first impression.

Now what are the circumstances of this case as compared with the circumstances of *Kensington Palace* and *Holyrood House?* The circumstances of this case, as stated in the special case, appear to me to be very remarkable as contrasted with those two, especially so as affecting *Holyrood House.* The circumstances affecting *Hampton Court* are thus stated in the special case which has been laid before your Lordships:—[His Lordship read a part of it.]

Then it is stated that this is the first instance of a *fieri facias;* and it is stated as to writs of *capias,* that they have been on several occasions executed within the Palace, but it is not alleged that the officers of the Crown knew that such writs had been so executed.

Therefore, my Lords, it appears that the State Apartments are still reserved, and might be used for any purpose of state for which they might be required. The garden is still reserved, the fruit from the garden is supplied to the royal table; and living, as Her Majesty does, so near to this spot, there is no reason why she should not herself from time to time visit the garden, and, being there, why her gardener might not be taken by writ of *capias* in her presence. Farther than that, I contrast this case with *Holyrood,* in this respect. *Holyrood Palace* had not been, for a much longer period, occupied by any of the Royal Sovereigns of this country, as it is stated in this case. It had not been visited, I think, for nearly 200 years by any Sovereign, when the case as to its privilege occurred in 1820 (1), and there did not seem at that time to be the slightest likelihood of any Sovereign going to reside there. That case was determined upon these grounds:—First, that there were sentinels kept there. Secondly, that part

(1) 2 Wils. & Shaw, 1.

of the furniture of the very room in question where the property was seized was part of the Crown furniture; and, thirdly, and principally, it appears to me, upon the ground that it had been a royal residence, and that the Sovereign might at any time he pleased come to reside there. I do not think it was said by Lord *Gifford* in giving judgment, but it has been said since with regard to *Holyrood*, that there was no other palace in which the Sovereign could well have resided if he had been minded to visit Scotland. I am by no means clear upon that, regard being had to what everybody knows of the state of *Holyrood House* before the visit of *George* IV. It seems to me that it would have been as competent to fit up *Stirling Castle*, if it had been thought desirable, as to fit up *Holyrood* for the purposes for which the Sovereign did actually afterwards use it during his short stay there. It is quite true that after the case was determined in 1820, and before it came before this House, *George* IV. had held courts at *Holyrood*. Of course, as far as regarded any arguments as to the probability or the possibility of the Sovereign residing there, the fact that he had gone thither (although he would have found it difficult to reside there), was a fact so far of importance. But what the House had to determine in that case was, whether or not the seizure in 1820 was justifiable. All the authorities concur in this, that it is not a question, in the first place, of actual and distinct residence; nor is it a question, as the Judges have all been careful to say, in the *Kensington Palace Case*, and in the other cases, whether or not there is a likelihood or probability of the Sovereign residing there; but the question really comes in substance to this, whether there is a distinct and clear abandonment of the Palace, so that you can say that the Palace is abandoned as a residence, and is only to be treated as a palace in this sense, that it forms part of the property of the Crown, as the *Tower*, which is one of the cases which has been referred to, or as *Stirling Castle*, which is now entirely abandoned as a palace.

With reference to this, a question was pressed upon the learned Judges in the Court below who took the contrary view to that which I am now supporting, that if it could be reasonably used for any purpose, the time required to fit it up for the Sovereign's residence was not to be considered. Of course, you were not to

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consider whether there was a likelihood of the upholsterers' work being done at short notice, and the place being furnished so as to fit it for the actual residence of the Sovereign. And the case of *St. James's Palace* was mentioned, where apartments are allotted out, some to members of the royal family, and some to officers who reside in the apartments, and the Palace is also used for the purpose of holding courts and levees. I observe that Mr. Justice *Lush*, noticing that part of the case, although he took the contrary view as to *Hampton Court Palace*, conceives, as he expresses it, that the use of any place for any public service to which it might be applied, such as the holding of courts, would constitute it a place entitled to the privileges in question. That I may not misrepresent his words, perhaps I had better read them. He says, Lord *Coke* "does not say to all the King's palaces simply, which might include some where the King did not reside, nor does he limit the privilege to that in which the Sovereign actually dwelt at the time of the intrusion. The qualifying words, taken in this proper and legal sense, apply to every place which the Sovereign keeps for his personal use, whether for special purposes only, as holding courts, &c., or for residence, either permanent, occasional, or temporary." When we say for "personal use," it is quite clear that in the case of *Kensington Palace*, which had not been occupied, I think, for sixty years by the Sovereign himself, that it could only be said to be occupied for the personal use of the Sovereign in a very qualified sense, inasmuch as at that time one of the royal family was residing there, and was not likely to be displaced for the purpose of the Sovereign's residence, much less likely, indeed, than that other inmates should be displaced, of whom there were several residing there, as in the case of *Hampton Court.*

And yet it was held, under the direction of Lord *Ellenborough*, that that was to be treated as a palace within the terms of the privilege, as laid down by Lord *Coke.*

Now, as regards the holding of courts we have here, as I observed in going through the statements in the special case, large state rooms which undoubtedly might be used either for the purpose of holding courts or of giving royal entertainments at *Hampton Court Palace*, and not very improbably so, considering

on the one hand the neighbourhood of *Hampton Court* to town, and, on the other hand, its neighbourhood to the palace where the Sovereign is now constantly residing at *Windsor*. There is no reason, indeed, why it might not be fitted up in a very short space of time for use, just as another place hitherto unoccupied by the Sovereign, *Claremont*, has been fitted up within a very recent period. But beyond all this, the circumstance that the gardens are kept, and that the chapel is also kept in the manner I have described, where if the Sovereign should attend during any weekly service any day other than Sunday, which, of course, is perfectly possible, an arrest under a writ of *capias* might take place in the very vicinity of the chapel, or if the arrest took place in the garden, the Sovereign might be walking there at the very time. All these circumstances appear to me to make this case far stronger than that of *Holyrood*, where the Sovereign had not resided for so great a length of time, and where indeed, until it actually happened that the Sovereign went to *Holyrood Palace* (1) between the hearing of the original case and the hearing of the appeal, there could not have been anything more extremely improbable than that the Sovereign should so reside.

My Lords, it appears to me, therefore, I confess, that there is no reasonable distinction between this case and the *Kensington Palace* case, and still less between this case and the case of *Holyrood Palace*, decided by your Lordships' House, and that, if it should be deemed expedient, the law should be rather altered by a legislative measure than by a judicial decision contrary, as it appears to me, to the decision of the House in the case of the *Holyrood Palace*. As regards the supposed hardship and impropriety, if I may so express it, of a state of law which would allow, in certain cases, debts to be contracted without any remedy for enforcing payment, it appears to me that that is sufficiently obviated by saying that the remedy would be that pointed out by Mr. Justice *Willes*, namely, an application to the proper officer, who would, no doubt, in all proper cases afford a remedy, either by compelling the

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(1) *George* IV. never did actually reside at *Holyrood Palace*. He merely held courts there, his real residence during his visit in *Scotland* being at *Dalkeith House*, the mansion of the Duke of *Buccleuch*. See Annual Register for 1822, p. 156, *et seq.*

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persons sued to leave the palace unless the debt were paid (that might be one mode of doing it), or by allowing the execution to take place within the precincts. If now for the first time execution were had in *Hampton Court Palace*, it would be placing it in a position in which, according to the authorities to which I have referred, no royal palace has ever yet been placed.

My Lords, upon these grounds, in my opinion, the judgment of the Court below should be reversed.

LORD CHELMSFORD:—

My Lords, the great difference of opinion that has prevailed among the learned Judges in this case has made me hesitate long, and weigh the arguments on both sides very carefully, before I arrived at the conclusion that the judgment appealed from ought to be affirmed.

In considering the case, the distinction must be constantly kept in view between a palace and a royal residence. A palace may once have been the residence of the Sovereign, but may have ceased to be so, and yet may continue a palace, though without the privilege which the Sovereign's personal or virtual presence imparts to it. The possibility of residence cannot be the test of this privilege, otherwise it must attach for ever upon a palace once occupied as a royal residence, and which is capable of being fitted up for immediate use, although the Sovereign has never shewn the slightest intention of residing in it.

The privilege of immunity from the intrusion of civil process into a palace is not one which attaches to the building itself, but belongs to it only as long as it is actually or virtually the residence of the Sovereign. By the term "virtually" I mean where the palace is occupied by the royal servants, and where it is kept up in such a condition that the Sovereign might, at any time, be able to take up her residence there without disturbing or interfering with the persons or the objects to which it may have been appropriated. This is entirely a question of fact, and one which must be determined by the actual state of things at the time the question arises. It is what may be called a fluctuating question, meaning by the expression one which depends upon changing facts and circumstances. A royal palace may be quitted in such a

manner, and so thoroughly dismantled, as to indicate an entire relinquishment of it as a residence from the very day on which it is left. It may have been disused as the actual residence of the Sovereign for a great length of time, and yet have been kept up so as to be ready for immediate occupation if any future wish to reside in it should occur. In the supposed cases there would probably be no difficulty in holding that in the former case the residence of the Sovereign had altogether ceased for the time, and in the latter that there never had been a discontinuance of residence.

I cannot think that the criterion is, whether the Sovereign has abandoned the intention of ever returning to a palace which has been discontinued to be the royal residence, because this could not be known at any time, and it would decide the question at once, as the privilege once annexed to the palace could never afterwards be proved to have been lost. It must be remembered that it is not the palace itself which is privileged; the actual or virtual residence of the Sovereign in it alone confers the privilege. So long as such residence continues it imparts the privilege; the moment the residence is not withdrawn merely, but altogether abandoned, the privilege ceases. This is necessary to be observed, because there is a slight inaccuracy in Lord *Ellenborough's* expressions in the case of *Winter* v. *Miles* (1), which is calculated to mislead. Speaking of *Kensington Palace*, in which *George* II. constantly resided to the time of his death, and in which his successor held his first council, and performed his first acts of state and government as King, he says: "It clearly therefore at that period was a royal palace of His present Majesty, entitled to every exemption which can be claimed in respect of any palace belonging to His Majesty. Being then such palace, the question is, when did it cease to be so and become no longer entitled to its former privileges?" What His Lordship intended to say was, the palace was clearly a royal residence in the time of *George* II. When did it cease to be such residence?

Now, residence or non-residence is a fact which must be determined, like every other fact, by the circumstances of each particular case. I quite agree that a question as to the discontinuance of any palace as a place of the Sovereign's residence might involve

(1) 10 East, 578.

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a delicate and an unbecoming inquiry. And where the circumstances are such that they cannot be investigated without trenching upon the respect due to the Sovereign, the Courts would be bound to retire from such an investigation, and if the indications of abandonment of residence were of doubtful import, they would hold in favour of the continuance of the privilege. But cases may occur where the circumstances are so clear and unequivocal that it may be possible to decide upon them without touching the honour and dignity of the Sovereign, or disrespectfully scrutinizing her inclinations and intentions.

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The question is, is Her Majesty at the present time virtually though not actually residing in *Hampton Court Palace?* In the words of Lord *Ellenborough* (1), "Is the Palace so occupied by others as that Her Majesty could not immediately return and reside in her own person if she were pleased to do so?" What are the apartments which it is supposed would enable Her Majesty to return and take up her immediate residence in the Palace? They are called the State Apartments, but consist of a picture gallery, a room called the Withdrawing Room, of which the only account we have is, that it was formerly called by the name of the Board of Green Cloth, and that the public are permitted to have access to it under certain regulations, and a gallery, which is used as a depository for lumber. These so-called State Apartments have not been used for any other than the above purposes for the last sixty years. There are also suites of apartments which, during this period, have been occupied by private individuals by the grace and favour and during the pleasure of Her Majesty. If the criterion of residence is that which Lord *Ellenborough* suggested in *Winter* v. *Miles*, it seems to me impossible to say that Her Majesty could immediately return and reside in *Hampton Court Palace* if she were pleased to do so.

But the case states, and great stress is laid upon these facts by the learned Judges who hold that the Palace is a royal residence, that a guard of honour is always on duty at the Palace, and Divine service is regularly performed in the Chapel Royal therein by a chaplain appointed and paid by the Crown, and who has apartments in the Palace assigned for his residence. The Sovereign

(1) 10 East, 578, 580.

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also has a pew in the Chapel Royal. The Palace, as well as the gardens which surround it, are maintained and kept in order by the Crown, and the grapes grown in the Vinery within the gardens are forwarded from time to time to the palace where Her Majesty may be residing for the service of her table. Sentinels are posted at the various entrances, and those entrances are opened and closed at the pleasure of the Crown. All these circumstances furnish strong evidence that *Hampton Court* is kept up and continued as a royal palace, but I cannot see how they prove that it is the residence of the Sovereign, or is capable of immediately becoming so.

With great deference to my noble and learned friend on the woolsack, I do not think that this question is settled by any previous decision. The circumstances connected with *Kensington Palace* may very closely resemble those of *Hampton Court Palace*; but there are marked differences between them which render the case of *Winter* v. *Miles* (1) inapplicable as an authority. Lord *Ellenborough* stated in his judgment that the State Apartments in *Kensington Palace* were used by nobody else, but were reserved for His Majesty and some of his officers; that the Palace was kept up fit for His Majesty's reception if he should choose to visit it. And adverting to the fact of some families residing in some parts of the Palace, he observed that notwithstanding this "the Palace was kept fit for His Majesty's reception at any time when he should choose to come there." No such capabilities of immediate residence are found in *Hampton Court.* The State Apartments are such only in name, and it cannot be said that any part of the Palace is kept up fit for Her Majesty's reception. The Picture Gallery, the Withdrawing Room, and the Lumber Room might be converted into apartments fit for the reception of the Sovereign, and they who are now the occupants of the apartments by Her Majesty's gracious permission might be removed at a moment's warning; but everything connected with the occupation of the Palace, and with the state of the unoccupied part, indicates that at present it has intentionally ceased to be a royal residence. It is, in fact, in that condition contemplated by Lord *Ellenborough* when he said, "had it indeed distinctly appeared that the immediate

(1) 10 East, 578, 580.

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personal residence of His Majesty was, by means of any occupation of the Palace incompatible therewith, rendered impracticable, we might have formed a very different conclusion on the subject." And his Lordship added: "Whenever a case so circumstanced shall occur the Court will not feel itself bound by anything now laid down from directing a jury that the exemption in question ought in such a case to be disallowed."

If *Hampton Court Palace* had been similarly circumstanced to *Holyrood* at the time when the case of the *Earl and Countess of Strathmore* v. *Laing* (1) was determined, that decision would of course be of binding authority upon your Lordships. But the case of *Holyrood* is clearly distinguishable. Lord *Gifford* indeed speaks of its being unquestionable that "*Holyrood House* has not been abandoned as a royal palace by His Majesty, and that actual presence of the King is not necessary to preserve the existence of the privilege," the proper question being whether it had been abandoned as a royal residence. Now at the time when this case was decided, *Holyrood* was the only palace in which the Sovereign could reside when he visited that part of his kingdom. It was kept up always for his reception, and was exclusively appropriated to the Sovereign's use. Suppose the question had been asked, which is the royal residence in *Scotland?* The only answer could have been, the Palace of *Holyrood*. The visit of *George* IV., which took place after that intrusion of the Defender into the Palace which led to the action of *Strathmore* v. *Laing*, only furnished a practical proof of that which had been known long before, that this was the residence of the Sovereign when in that part of his kingdom. There never was any abandonment or disuse of this residence, but actual use whenever necessary, and only non-use when absence from *Scotland* made personal residence impracticable.

For these reasons I am of opinion that the judgment of the Court of Exchequer Chamber ought to be affirmed.

LORD COLONSAY:—

My Lords, I think this is a question attended with very considerable difficulty. The principle I apprehend to be, as to this exemption, that it is not to be an exemption in favour of debtors, or

(1) 2 Wils. & Shaw, 1.

their chattels, but it is a matter which relates to the exclusion of any inconvenience, or indecorum, in regard to one of Her Majesty's royal residences. Therefore, the matter to be considered is whether *Hampton Court Palace* is to be regarded as a royal residence, or not.

I am not at all surprised that there has been great difference of opinion upon that point. I think that almost all the learned Judges who have given opinions upon this case do concur in the view that the question is not merely whether *Hampton Court* is to be called a palace, but whether it is a royal residence. I think that that is what they all mean. But then what constitutes a royal residence, where there is no positive definition, or rule, laid down upon the subject, is what has caused the difficulty. And it is not surprising that it should cause difficulty, because when you have certain circumstances pointing to the one view, and other circumstances pointing to the other, it is not wonderful that different minds should take different views with respect to the conclusion that ought to be arrived at.

I do not think that the fact of a place having once been a royal residence is necessarily conclusive evidence upon this point; and, accordingly, in the opinions which were delivered to us by the learned Judges, and in those which were delivered in the Courts below, extreme cases are put on the one side, and on the other. There are beyond all question cases in which what was once a royal residence has completely ceased to be so, and there are cases in which the immediate momentary presence of the Sovereign is not necessary to constitute a royal residence. One case of absence was put where the palace was undergoing great repairs or alterations, but that does not preclude it from being a royal residence. On the contrary, it would be rather an indication of its being a royal residence, because those repairs and alterations would be for the purpose of rendering it more suitable for the residence of the Sovereign, just as they would be with regard to any other person's residence. But I do not think that the circumstance of its having been the residence of the Sovereign, and the Sovereign having ceased to reside, and abandoned the intention of residing in it, is any reason why the Sovereign should not resume the intention of residing there, and come back to reside in that place; or why a subsequent

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Sovereign should not have the intention of residing there. The principle upon which the rule exists as to this matter is to prevent intrusion which might be indecorous and annoying to the Sovereign who is or may be there at the time. But this is represented as a sort of intermittent palace, a place which is put for a time into a position in which it cannot be regarded as a royal residence, and which may again become a royal residence. The case of *Holyrood House*, I think, was a different case. As to the residence of *George* IV. there, although it had not occurred at the time when judgment was given in the Court below, yet it was an indication of what was understood to be the reservation of the place, and the readiness of the apartments for the reception of the Sovereign, for which purpose they were occupied, without any very great amount of preparation.

My Lords, I shall not go through the circumstances in this case for the purpose of inquiring whether they constitute *Hampton Court Palace* a royal residence, for they have been stated separately, I think, on each side by each learned Judge who has given an opinion on this case; but the conclusion which I have arrived at is that they are not sufficient to sustain the privilege, and that the judgment of the Court below ought not to be altered; for I concur with my learned and noble friend on the woolsack that this should be a matter of legislation rather than of judicial determination; and I shall certainly not go into that. To the best of my judgment the cases which have been cited do not establish that *Hampton Court* is to be regarded as a royal residence. That there never has been any execution in it before does not appear to me to be a matter of importance, no question having been raised about it. Upon the whole, therefore, I concur in sustaining the judgment of the Court below in this case.

Judgment of Court of Exchequer Chamber affirmed.

Lords' Journals, 4th April, 1870.

Attorney for the Crown: *Solicitor of the Board of Works.*
Attorneys for Defendants: *Burchell & Hall.*

THE DUKE OF BUCCLEUCH . . . . . APPELLANT;

AND

EDWARD THOMAS WAKEFIELD . . . . RESPONDENT.

ET E CONTRÀ.

1869
July 5, 6, 8, 9, 13.
1870
March 25.

Inclosure Acts—Mines—Surface of Land—41 *Geo.* 3, *c.* 109—1 & 2 *Geo.* 4, *c. x.*—*Practice.*

Under the *General Inclosure Act* (41 Geo. 3, c. 109, s. 32), lands of a manor sold to a purchaser for the purpose of defraying the expenses of the Act would be discharged from all common and other rights thereon and therein, and would be vested in him in fee simple, and held in severalty by him as his private and absolute property. The 44th section, however, provides that the general Act should be binding only so far as should not be otherwise provided in any special Act.

A special Inclosure Act (1 & 2 Geo. 4, c. x.) recited the general Statute, and incorporated such of the provisions of the Statute as were not repugnant to, or controlled by, the clauses of the special Act, and then contained a clause reserving to the lord of the manor, &c., "according to their respective estates and interests therein, all mines, beds, seams, and veins of coal, lead, copper, tin, and iron, and other mines and minerals whatsoever, and all quarries of stone, slate, and flags, and all quarries whatsoever, found, or hereafter to be found, upon, with, or under the said lands or grounds hereby directed to be divided and inclosed, or any part or parts thereof," with full power to enter on the said lands or any part thereof, except certain specified parts (of which the subject matter of this suit was not one), "to search, bore, and dig for coal, &c., and all other minerals, &c., and to sink shafts and open veins in or upon the said lands or any part thereof, and to land such coal, &c., and lay and deposit the same on the said lands," and to continue the same there, and to take away the same in any manner whatever, "through or over the said lands, or any other of the customary lands within or holden of the said manor," and for that purpose to open gaps in the fences, and to make roads when and so often as he might think proper, and to "sink and drive such and so many pits, quarries, levels, soughs, saflights, tunnels, saights, and other necessary works within or upon the said lands," as he might think proper for getting the minerals, and to set up houses for workmen and buildings for smelting, &c. "in as full and ample a manner to all intents and purposes as could have been done if the said lands had remained open and uninclosed, or this Act had not been passed, &c., yet, nevertheless, making reasonable compensation for damages done by such works as aforesaid to the persons sustaining such damage":—

Held, that, under the words of the special Act, the lord of the manor was entitled to the mines under the lands sold to pay the expenses of the Act, and was also entitled to work such mines to an extent which might reach to the

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utter destruction of the land above, subject only to the liability to pay compensation for damage done.

In a suit in which the Plaintiff claimed to be the absolute owner of certain land purchased under the provisions of this special Act passed to inclose the lands of the manor, the Court below made a decree declaring that he was only the owner of the surface of the land, but that, by the provisions of the Act, the Defendant continued the owner of the mines underneath the surface; and at the same time granted an injunction to restrain the Defendant from working the mines under the Plaintiff's land. On appeal, this House affirmed the first part of the decree, but reversed that part which granted the injunction; and as this amounted to a declaration that the Plaintiff was wrong upon both points, the House ordered his bill to be dismissed.

THESE were two appeals against a decision of Vice-Chancellor *Malins*.

The facts of this case have been fully stated in the report of it in the Court below (1), and the following is a summary of them:—

Mr. *Wakefield* was the purchaser of some land which had formed part of the manor of *Plain Furness*, in the parish of *Dalton*, in the county of *Lancaster*, and had been sold under an Inclosure Act passed with reference to that manor. He had not been a tenant of the manor, but was a mere purchaser under the sale directed to be made of certain parts of the manor selected by the Commissioner with a view to defray the expenses of the Act. The Duchess of *Buccleuch* was at the time the lady of the manor, and the Duke of *Buccleuch* has now succeeded to the possession of it. The Act was the 1 & 2 Geo. 4, c. x., and the question intended to be discussed arose upon the construction of some of its clauses taken in conjunction with certain sections of the *General Inclosure Act* (41 Geo. 3, c. 109) which it recited, and had partially incorporated with itself. On these sections and clauses Mr. *Wakefield* contended, in substance, that as he was a mere purchaser of the land sold under special directions in the Act, and for special purposes thereby specified, he was entirely free from any of the liabilities which attached upon the tenants of the manor who had had land allotted to them in virtue of their tenancies; and was the absolute owner of the land he had purchased under the provisions of the *General Inclosure Act*. The Duke, on the other hand, contended that the land sold and the land allotted were alike equally subject to his rights as

(1) Law Rep. 4 Eq. 613.

lord of the manor, such rights having been expressly reserved in the special Inclosure Act.

By the 14th section of the *General Inclosure Act*, 41 Geo. 3, c. 109, it was enacted that the several shares of and in any lands or grounds which should upon any division be assigned, set out, allotted, and applied unto and for the several persons who should be entitled to the same, should, when so allotted, be, and be taken to be, in full bar of, and satisfaction and compensation for, their several and respective lands, grounds, rights of common, *and all other rights and properties whatsoever* which they respectively had or were entitled to in and over the said lands and ground immediately before the passing of any such Act.

By the 32nd section it was enacted that in case it should be provided by any special Act that the expenses attending the same should be paid by the sale of any part of the land to be inclosed the Commissioner should set it out and sell it "to any person or persons for the best price that could be gotten for the same, by private contract or public auction; and that every allotment for which the full purchase-money should be paid should immediately thereupon be absolutely *discharged of and from all common and other rights thereon or therein, and be vested in fee simple in, and be inclosed and held in severalty by*, such purchaser or purchasers thereof respectively, *as his, her, or their private and absolute property*, and should be allotted accordingly by the Commissioner."

The 40th section provided that nothing in such Act contained should lessen, prejudice, or defeat the right, title, or interest of any lord or lady of any manor or lordship within the limits of which the lands to be allotted were situate, of, in, or to the *seigniories, rights, or royalties* incident or belonging to such manor or lordship, or to the lord or lady thereof, but that the same (other than and except such interest and other property as were or were meant to be barred by such Act) should remain in as full, ample, and beneficial a manner as if such Act had not been passed.

The 44th section provided that the general Act should be binding only so far as should not be otherwise provided in any special Act.

In the 1 & 2 Geo. 4, a local Act was passed (c. x.) intituled, "An Act for inclosing Lands in the Townships or Divisions of *Kirkby Ireleth*, and of *Lindale* and *Marton*, in the Parish of *Dalton*, in the

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County of *Lancaster*." Of the places which were the subjects of the provisions of this Act the manor of *Plain Furness* was one. The Act contained the usual recital of expected advantages from the inclosure, and it recited the *General Inclosure Act*, and appointed the Commissioner to carry the Act into execution "with, under, and subject to such of the powers, authorities, regulations, provisions, and directions contained in the recited Act as are not repugnant to, controlled by, or otherwise provided for, by any of the clauses or provisions of this Act."

The 21st clause of this special Act authorized the Commissioner to set out parts of the moors, commons, and wastes, as he should think necessary for public watering places, and springs, and wells, for the use of the inhabitants of the townships or divisions, which said parts, springs, and wells, &c., were thenceforth to be vested in the surveyor in trust for the purposes aforesaid.

The 23rd clause empowered the Commissioner to "set out such parts of the said moors, commons, and wastes as in his judgment would be necessary to be sold, in order by sale thereof" to defray the expenses of passing the Act and carrying it into execution, and to sell the parts so set out "according to the directions in the said recited general Act contained," and to apply the moneys in payment of such charges, and if there was any surplus to dispose of the same as thereafter directed: "Provided that in all cases where any of the persons, &c., interested in any allotment of the moors, commons, and wastes should be desirous of paying their shares of the expenses in money, instead of sustaining a loss of land in their allotments, and give notice, &c., their shares should be paid in money, and in all cases where any such payment was made the Commissioner should consider the same in setting out the allotments of the parties making such payments, and in ascertaining the share or proportion of the said moors, commons, and wastes, so to be set out and allotted to such persons respectively."

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By clause 24, the Commissioner, after allotting as before directed, was to set out in two or more plots for the lord of the manor, and "as a compensation for his right and interest in the soil of the said moors, commons, and wastes, one full sixteenth part (quality and situation considered) of the remainder of the said moors, &c., such sixteenth to be over and above and exclusive of

such shares, proportions, and allotments of the said moors, &c., as the lord of the manor should be entitled to as thereinafter was mentioned as an owner or proprietor of any messuages," &c., in the said townships.

The 28th clause allowed the allottees to sell their allotments before the execution of the award, and the 29th clause enacted that "all allotments to the customary tenants of the manor of the said moors, commons, and wastes should be and become estates of freehold in the several and respective parties to or for whom the same should be set out, &c., to be holden of the said manor of *Plain Furness* in fee and common socage, *subject and without prejudice nevertheless to the rights* of the said Duchess of *Buccleuch, or any* future *lord* or lady *of the said manor* of *Plain Furness,* to *all mines, minerals, and quarries in or under the same.*"

The 34th clause enacted that all the expenses attending the passing of the Act and carrying it into execution should be paid out of such sales, and the Commissioner was directed so to apply the money, and in case there should be any surplus, it was to be distributed amongst the persons interested in the moors, &c., "Provided that in case the money arising by the sales should not be sufficient to defray the charges, the deficiency was to be made up by the persons interested in the lands intended to be divided and inclosed, and should be paid in such shares and equitable proportions as the Commissioner should direct."

The 43rd clause, "Saving, excepting, and reserving unto the Duchess of *Buccleuch,* and the person for the time being entitled to the manor, or to the said mines, minerals, and quarries, according to their respective estates and interests therein, all mines, beds, seams, and veins of coal, lead, copper, tin, and iron, and other mines and minerals whatsoever, and all quarries of stone, slate, and flags, and other quarries whatsoever, already found, or hereafter to be found, upon, with, or under the said lands or grounds hereby directed to be divided and inclosed, or any part thereof, with full liberty, power, and authority, from time to time, and at all times hereafter, to enter into and upon the said lands hereby directed to be divided and inclosed as aforesaid, or any part thereof (other than and except such part as may be set out for a stone quarry or watering place for such purposes as aforesaid)," to dig for

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coal, &c., to sink shafts and open veins and quarries, and to land the coal and other minerals, and to deposit the same on the lands and grounds, and to take away the same "through or over the said lands, or any other of the lands within or holden of the said manor," and for that purpose to open gaps in any part of the fences, and to make and continue horse and carriage and foot roads, and for such purpose to divert and turn any rivulet, "so as the same shall not be injurious to any messuage or mill already erected;" and to do other like things (all being specially enumerated) "in as full and ample a manner to all intents and purposes as would or might have been done if the said lands had remained open and uninclosed, or this Act had not been passed, without any interruption whatsoever, yet nevertheless making reasonable compensation for damages done by such works as aforesaid to the person or persons sustaining such damage."

The 44th clause reserved to the lord all seigniories, royalties, and services "in as full, ample, and beneficial a manner as he could or might have exercised, &c., the same" if the Act had not been passed.

The Commissioner appropriated certain parcels of the moors, commons, and wastes for sale to defray the expenses, and one of these appropriated parcels became the property, by purchase, of Mrs. *Jane Towers*. The conveyance made under this sale did not contain any grant of minerals.

In November, 1862, the Duke of *Buccleuch* granted to *Miles Kennedy* a license (which was to be converted into a lease) to mine for iron ore, subject to the payment of all reasonable compensation for surface or other injury to any persons that be thereto entitled by reason of the carrying on and management of the said works. In 1863 Mr. *Kennedy* discovered a vein of iron ore (hematite iron, which crumbles more than other iron ore, and does not afford the same sort of support to the surface) under the allotment purchased by Mrs. *Towers*, and began to work the same. In April, 1865, Mr. *Wakefield* purchased a portion of the land belonging to Mrs. *Towers*, and claimed to be the absolute owner of the mines and minerals under the same, according to the provisions of the *General Inclosure Act* before referred to. In June, 1865, he filed a bill in Chancery to enforce this claim. In June, 1867, a decree was made by Vice-Chancellor *Malins*, declaring the Duke of *Buc-*

cleuch to be absolute owner of all the mines in the manor, but as he thought upon the evidence that the mines could not be worked without great injury to the surface, he granted an injunction to restrain Mr. *Kennedy* from working those mines which lay underneath the land of Mr. *Wakefield*. That gentleman appealed against the first part of this decree, and the Duke of *Buccleuch* and Mr. *Kennedy* appealed against that part which granted the injunction.

Sir *R. Palmer*, Q.C., and Mr. *Freeling*, for the Duke of *Buccleuch*:—

In a case of this sort there is no distinction between the tenant of the manor who has lands allotted to him under the Act and a stranger who purchases such of the lands as the Commissioner, instead of allotting to the tenants of the manor, sells in order to defray the expenses of the Act. The rights of both depend on the words of the Act; and here those words in the reservation clause, the 43rd clause, are of the most wide and inclusive kind in favour of the rights of the lord. The 29th clause, in the same way, expressly declares that what is done under the Act is to be done without prejudice to the rights of the lord of the manor.

As a rule of law the lord is always entitled to work his mines in the ordinary way of working mines, and may work them though he injures the surface. The utmost restriction upon him is, that he shall leave sufficient pasture for the commoners' cattle: *Cruise* (1). But this sufficiency relates to what is left on the whole manor, not on any particular portion of it. The soil was in him, and the word "soil" in an Inclosure Act includes the surface, as well as everything else: *Pretty* v. *Solly* (2). The lord here has not received compensation for anything but his interest in the surface, and in those rights of common which are abolished by this Act. His other rights are expressly reserved. In *Filewood* v. *Palmer* (3), in which *Weekes* v. *Slake* (4) and *Arthington* v. *Fowkes* (5) are referred to, the rights of the lord of a manor are fully recognised. *Arlett* v. *Ellis* (6),

(1) Dig. tit. "Common," 47–50.
(2) 26 Beav. 606.
(3) 5 Vin. Abr. p. 8, s. 33; Moseley, 171; S. C. Melm. MSS. E. 53, where these words are added: "The lord is absolutely entitled to the mine, provided he leaves sufficient common."
(4) 2 Vern. 301.
(5) Ibid. 356.
(6) 7 B. & C. 346.

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Place v. *Jackson* (1), and *The Earl of Rosse* v. *Wainman* (2), are to the same effect. Even where land has been purchased for the purpose of a railway there is no such absolute right to support of the surface as will prevent the lord or his assignee from working the mines. The question is one of compensation between them: *Fletcher* v. *Great Western Railway Company* (3).

The right of the lord may, by custom of the manor, be even more extensive. A custom for him to dig clay pits and remove the clay, even if he does not leave sufficient pasture, may be good: *Bateson* v. *Green* (4). Nay, a custom of a similar kind may exist in favour of the commoner: *Hanmer* v. *Chance* (5); *Marquis of Salisbury* v. *Gladstone* (6); and if so, *à fortiori* in favour of the lord.

The cases which seem to declare the absolute right of the owner of the surface to support, such as *Hilton* v. *Earl Granville* (7), *Humphries* v. *Brogden* (8), and *Harris* v. *Ryding* (9), cannot be supported to that extent, and the important *dictum* in the first of them has been distinctly overruled in this House in *Rowbotham* v. *Wilson* (10). It is also to be remarked that when *Hilton* v. *Lord Granville* was before Lord *Cottenham* (11), on a motion for an injunction to restrain the working of the mines, the injunction was refused, and the Defendant was merely required to make admissions for the purpose of trying the legal right, although there was reason to apprehend that if the working was continued the Plaintiff's houses erected on the surface would be totally destroyed or irreparably injured before the legal right could be decided.

The Act here reserves in the fullest manner (12) the rights of the lord as the mine owner, such as he possessed them at the time of the passing of the Act; and this particular reservation is not affected by the words of the *General Inclosure Act*, but is independent of them, both by the provisions of that statute and of this

(1) 4 D. & R. 318.
(2) 14 M. & W. 859; affirmed, 2 Ex. 800.
(3) 4 H. & N. 242; affirmed, 5 H. & N. 689. See also *Great Western Railway Company* v. *Bennett* (Law Rep. 2 H. L. 27), which was, in substance, an appeal arising on the decision in *Fletcher* v. *The Great Western Railway*.
(4) 5 T. R. 411.
(5) 34 L. J. (Ch.) 413.
(6) 9 H. L. C. 692.
(7) 5 Q. B. 701.
(8) 12 Q. B. 739.
(9) 5 M. & W. 60.
(10) 8 H. L. C. 348.
(11) Cr. & P. 283.
(12) See *ante*, p. 381.

special Act. The injunction, therefore, which prevents the Duke of *Buccleuch* from working the mines is unwarranted, and in that respect the decree of the Court below is erroneous. So far as it declares the right of the Duke to the property in the mines it is correct.

Mr. *Mellish*, Q.C., and Mr. *Stiffe Everitt*, for the Respondent:—

The real question here amounts to this: whether a lord may work his mines, not only under the proper lands of the manor, but under those which have been sold and are freed from manorial rights, and work them without leaving any support whatever to the surface of the land; whether, in fact, he may so destroy the land that it shall be unfit for building or for the feeding of cattle. The other side can hardly contend for the affirmation of such a proposition. The argument must be confined to this, that the lord has the same rights with relation to the surface which he had before the passing of the Act. The Act certainly gives him no more. Then what were those rights? There was no special and particular custom in this manor which gave him the right of letting down the surface. Or if the lord contends that such an extensive and extraordinary right is reserved to him, the burden lies on him to shew the reservation, and to shew likewise that what he is doing comes within the terms of it. He must also establish that these large reserved rights affect not only the tenants of the manor, but the purchasers of those portions of the manor which have been sold to strangers under a special provision in the Act in order to defray the cost of the inclosure. Even as to copyholders who received allotments, the rights reserved to the lord were not without limit. The Legislature never could have meant that the mine owner might work his mines and get his minerals though committing any amount of injury to the land and farms, and to buildings which were upon the surface of the spot where he was working. Certainly no such power was given him by express words in the special Act, and none such could be conferred upon him except by express words. It never could be meant that the people who purchased the land which, by the general statute, was to be free from commonable rights, should be subject to mining rights that might render utterly valueless, and even destroy, what they had purchased. The right to support is not a mere easement, but is an ordinary

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right of the enjoyment of property: *Backhouse* v. *Bonomi* (1). It cannot, therefore, be taken away but by the clearly expressed intention of the Legislature. In the case of a private grant it can only be affected by express and unambiguous words, such as appear to have been used in the case of *Williams* v. *Bagnall* (2) (observed upon in this case by Vice-Chancellor *Malins*), where Vice-Chancellor *Wood* refused an injunction because the grant had contained express words of reservation that had swept away all the implications of law which would otherwise have rendered the grantor liable for damage occasioned to the surface. *Harris* v. *Ryding* (3) has never been questioned, and is a decisive authority for the owner of the surface. There the reservation was of all and all manner of coals, &c., iron ore, and all other mines, minerals, and metals which then were, or at any time and from time to time thereafter should be, discovered, &c., with free liberty of ingress, egress, and regress, to come into and upon the premises to dig, delve, search for, and get, &c., the said mines and every part thereof, &c., and to sink shafts for the raising up works, &c., making a fair compensation "to the grantee of the land for damage to be done to the surface of the premises and the pasture and crops growing thereon." It is hardly possible to frame a more extensive reservation. That case came before the Court on demurrer to the replication, but the Court thought the pleas which set up this reservation as a justification for destroying the surface of the land, bad, and held that under it the grantor was not entitled to take all the mines, but only so much as he could get, leaving a *reasonable* support to the surface. In *Humphries* v. *Brogden* (4) it was found that the working of the mines was careful and according to custom, yet, in a most carefully considered judgment, the Court declared that, notwithstanding such finding, the Plaintiff was entitled to have the verdict entered for him, for that, of common right, the owner of the surface is entitled to the support of the subjacent strata. *Smart* v. *Morton* (5) also declared the absolute right of the owner of the surface to support. There the plea set out all the grounds of defence such as are here relied on; but it was held bad

(1) 9 H. L. C. 503.
(2) W. N. for Dec. 15, 1866; Printed Papers in this case, App. 291, 292.
(3) 5 M. & W. 60.
(4) 12 Q. B. 739.
(5) 5 El. & Bl. 30.

because the occupier of the surface has a *primâ facie* right to its support, and the deed of grant in that case did not expressly authorize a working in derogation of such a right. Yet the words there were very strong. The grantee of the mines was declared to have "free leave and liberty to sink, work, and win the mines and minerals, and to drive drifts, make watergates, or use any other way or ways," or "do any other act or thing necessary, needful, or convenient" for the better and more commodious working and winning the same; and compensation was provided for damage thereby occasioned. The whole matter of complaint there was, that support was not left to the surface, and on that ground alone the Plaintiffs were held entitled to maintain their action.

The first important case on the construction of Inclosure Acts is that of *Roberts* v. *Haines* (1). There the Act gave power to allot commons and waste land in a manor. It recited that the lord was entitled to the soil of the commons and waste lands, and enacted that it should be lawful for him to come upon them to search for and get coal to erect works and make bricks, making compensation for damage; but the Court held that this conferred no power on him so to work the mines as to destroy the support of the surface. And, on appeal, the Court of Exchequer Chamber held (2) that the common law right of the owner of the surface to support was not affected by the Act. *Rowbotham* v. *Wilson* (3) does not impugn the principle here stated; for there, as Vice-Chancellor *Malins* remarks in his judgment, the award, to which the signatures of both parties had been appended, distinctly declared that the mines thereby reserved should be worked "without molestation from any party to these presents being owner of the surface of the lands under which the mines were situate," and that the mine owner should not be "liable to any action for damage on account of working the said mines by reason that the surface of the lands aforesaid may be rendered uneven and less commodious to the occupiers thereof by sinking in hollows, or being otherwise defaced and injured." That was an express permission given to the owner of the mines to do what he did. No such permission was given here. In *Dugdale* v. *Robertson* (4) Vice-Chancellor

(1) 6 El. & Bl. 643.
(2) 7 Ibid. 625.
(3) 8 H. L. C. 348.
(4) 3 K. & J. 695

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Wood recognised and acted on the previous decisions, which declared the right of the owner of the surface to support; and in *Proud* v. *Bates* (1), where the same question again came before him, though, under the circumstances there, he held the owner of the mines entitled to more than an ordinary right of way over the land, he also declared that the lessee of the land was entitled to support for the surface of the land as incident to the demise thereof, and that he could not be deprived thereof by a mere implication in the lease. In *Blackett* v. *Bradley* (2) the reservation in the Inclosure Act resembled the present, the lord was to have the same rights as if the Act had not been passed, and a prescription was set up for working the mines without leaving support for the surface, but it was held that such a prescription was bad, and that the reservation of the former rights could not give the mine owner the power so to work the mines as to destroy the surface. And in that case it was distinctly stated by the Court (3) that though some of the reasoning in *Hilton* v. *Lord Granville* (4) had been impugned, the decision itself had not been overruled; and it was there acted on. The case of the *Caledonian Railway* v. *Sprot* (5) does not authorize the doctrine now contended for. That case really decided that a conveyance of land to a railway company for the purposes of the line gives by implication a right to all reasonable adjacent and subjacent support, but that if there was a general reservation of former rights, and no such special purpose connected with the grant of the land, those rights might be exercised, though to the injury of the surface. So it may be admitted here that if the lord here, at the time of passing of the Act, had the right so to work the mines as to let down the surface, the reservation to him of the rights he possessed at the time of passing the Act might give him the power now contended for, at least as to the lands of the manor, but not as to any others. But there is no proof, nor, indeed, any allegation, that he had any such rights, and if not, then the reservation, however wide may be its language, will not, by mere implication, give them to him. The reservation of old rights of seeking for minerals could not give him any new

(1) 34 L. J. (Ch.) 406. (3) 1 B. & S. 955.
(2) 1 B. & S. 940. (4) 5 Q. B. 701.
(5) 2 Macq. Sc. Ap. 449.

powers: for example, he could not, under that reservation, erect smelting-houses on the lands of the tenants; it required an absolute and express declaration that he was to have such a power in order to justify him in erecting them.

The 14th and the 32nd sections of the general Statute are adverse to the claim of the Duke, for by the 14th the allotments set out are to be in full satisfaction of "all rights and properties whatsoever in and over the lands and grounds," &c., before the passing of the Act; and by the 32nd section, the purchaser of the land sold is to hold it discharged from "all common and other rights thereon and therein," and it is to be vested in him in fee simple, and held in severalty, as his "private and absolute property." It is true that the 40th section says that nothing in the statute is to defeat the title of the lord of a manor to "the seigniories, rights, and royalties incident to the manor;" but those words are not sufficient to embrace the right of working mines without reference to the injury or the destruction of the surface of the land. And whatever rights he before possessed must here be taken to have been compensated by the allotment, under the 24th clause of the special Act (1), of a sixteenth part beyond the amount to which he would otherwise have been entitled.

The general purpose of the Inclosure Act was to make all the land free, and to discharge it from manorial rights of whatever kind. The reservation clause is opposed to that general purpose, and is therefore without effect: *Riddell* v. *White*, where Lord Chief Baron *Macdonald* says (2): "a saving repugnant to the purview of the instrument is void."

Then as to evidence of the custom. There was no evidence of any custom in this manor for the lord to work under the surface so as to destroy it, and evidence of what was done in any adjoining manor could not affect this: *The Marquis of Anglesey* v. *Lord Hatherton* (3). The special right claimed here is in direct opposition to the general right of the owner of the surface, which, as Lord *Kenyon* declared in *Townley* v. *Gibson* (4), was the right not only to the soil itself, but of everything under it.

All the cases on the relative rights of lords of manors and the

(1) See *ante*, p. 380.
(2) 1 Anstr. 281–294.
(3) 10 M. & W. 218.
(4) 2 T. R. 701–705.

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commoners shew that the lord must leave sufficient pasturage for the commoners' cattle: *Smith* v. *Feverel* (1); *Blackett* v. *Bradley* (2); *Bateson* v. *Green* (3); *Arlett* v. *Ellis* (4); in the last of which it was held that it lay on the lord to shew that he had in fact left a sufficiency of common. He cannot do this if he destroys the surface, and therefore all the well-established law on that matter will be subverted if he is allowed to do what he claims here.

In *Badger* v. *Ford* (5), Lord Chief Justice *Abbott*, speaking of the powers of lords of manors, said: "I think it is too much to suppose a reservation of a power by the lord, at the time of the original grant, the effect of which would be to enable him to annihilate the right of common altogether;" and *The Marquis of Salisbury* v. *Gladstone* (6) does not deny that principle, but sustains it, for there the custom was treated as one which had had a reasonable and, perhaps, a beneficial and a necessary origin (7).

Mr. *Freeling* replied.

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THE LORD CHANCELLOR (Lord *Hatherley*) having stated the case, said:—

The points that are in dispute in the cause are these: First, whether or not as against Mr. *Wakefield*, the Plaintiff in the suit, the Duke is entitled to the ownership of the mines, minerals, and quarries under these particular lands which have been acquired by Mr. *Wakefield* in the manner I shall presently state; and, secondly, assuming the Duke, as the Vice-Chancellor held him to be, entitled to those mines, minerals, and quarries, whether he is entitled to work them in such manner as to damage buildings which may be erected by Mr. *Wakefield*, or in any manner disturb the surface of the soil which is possessed by Mr. *Wakefield*.

The controversy has thus arisen:—In the year 1821 an Act of Parliament was passed for the purpose of inclosing the wastes of the manor of *Plain Furness*. The predecessor in title of the Appellant, the Duke of *Buccleuch*, was undoubtedly then possessed, as lady of the manor, of the soil of the waste of the manor, and

(1) 2 Mod. 6.
(2) 1 B. & S. 940.
(3) 5 T. R. 411.
(4) 7 B. & C. 346.
(5) 3 B. & Ald. 153–155.
(6) 9 H. L. C. 692.
(7) *Per* Lord *Cranworth*, 9 H. L. C. 703.

also of the minerals under the soil, and so it is recited in the Inclosure Act. The Act then proceeds to deal with the property in a manner which I must particularly describe, because it appears to me that within the four corners of that Act is contained all that is necessary for the adjudication of the rights as between the parties.

The Act, therefore, should be carefully studied in some of its more prominent clauses; and first, I will begin with the recital of the Act itself. It recites the title of the lady of the manor, the predecessor in title of the Duke of *Buccleuch*. That recital is as follows: it states in the preamble that there are within certain townships and divisions, which are mentioned, "within the manor of *Plain Furness* in the county of *Lancaster*, certain stinted pastures, tracts of moor, common and waste ground, usually called or known by the several names of the *High Moor*, the *Low Moor*, *Stewner* and *Ireleth Marsh*, and *Powka* and *Lindale Moor*, and also several other small parcels of waste lands containing in the whole by estimation 500 acres;" and then it recites that the "Duchess Dowager of *Buccleuch* and *Queensberry* is lady of the said manor of *Plain Furness*, and as such is entitled to the soil of all the said moors, commons, and wastes, and to all mines, minerals, and quarries, of what nature or kind soever, within or under the same." Therefore the title of the Duke, or rather of his predecessor in title at that time, in 1821, to the soil of the wastes, and to all the minerals under the same, is distinctly and clearly set forth in that Act.

Then the Act proceeds to enable a certain Commissioner to inclose these wastes, and throughout the Act it is to be observed that the power of the Commissioner is clearly and plainly confined to that particular purpose, namely, the allotting out of the soil of the waste lands of the manor, and there is reserved in the 43rd clause (which is the important clause to be considered in this case), beyond all possibility of dispute as far as that part of the case is concerned, in words which admit of no doubt, and upon which no argument has been raised to the contrary, a full and entire right to the minerals.

Although a Commissioner was appointed to allot and divide the soil, there was a suggestion made, but I think it was scarcely pressed (as it indeed hardly could be) in argument—there was just

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a bare suggestion, which I will deal with, and then pass by that part of the subject at once—that under the 24th clause of the Inclosure Act, there being the power to make an allotment to the lady of the manor in respect of her interests in the soil, that allotment would cover also the interests which the lady of the manor might be entitled to in respect of the minerals. The 24th clause enacts:—[His Lordship read it (1).]

Now, independently of a case which was cited in the Court below, a case as to which the Vice-Chancellor expressed his entire concurrence, a case which came before the Master of the Rolls as to the effect of the word "soil" (2) under circumstances where an Inclosure Act had been passed something similar to this, we have here clearly and distinctly a difference drawn between the interest of the lady of the manor in the soil, and her interest in the mines and minerals. In the preamble, which recites her being entitled to the soil and likewise to those mines, minerals and quarries, and also in the 43rd clause, there is, in the plainest manner, reserved to her all her interest in the minerals. That part of the case, therefore, is, I think, beyond dispute, I had almost said beyond argument.

But the argument of the Plaintiff in the cause, Mr. *Wakefield*, who is also the Appellant, as to one portion of the decree, as regards his particular position, is founded upon a different state of circumstances. There is a clause in the Act which directs the Commissioner to sell portions of the property in question—it does not there say whether including, or not including minerals, but to make a sale of certain portions of the property subject to his control and power, for the purpose of paying the expenses of the Act—and Mr. *Wakefield* holds his portion by a title derived from a Mrs. *Jane Towers*, to whom a portion of the property was sold by the Commissioner for the purpose of paying the expenses of the Act. The portion in question in this suit, I think, is about twenty-six acres. Mr. *Wakefield* having so purchased this property, which the Commissioner had sold under that power, has erected upon the portion so bought by him certain furnaces and other works of considerable value, and no doubt it is an object of considerable importance to him to know whether or not the buildings which he

(1) See *ante*, p. 380. (2) *Pretty* v. *Solly*, 26 Beav. 206.

may have put up upon that land can or cannot be affected by the mining operations of the Duke of *Buccleuch.*

Therefore, upon this branch of the case, he states his case thus: he says, I rely not only upon the words of the Act under which land may be sold for the purpose of paying the expenses of the Act, but I rely also upon the *General Inclosure Act,* and by the effect either of the particular clause in the local Act with reference to the sale and disposition of the land, or with reference to a section to the like effect in the general Act, by one or other, or by both, I am entitled to hold my lands undisturbed by the rights, whatever they may be, of the lord of the manor.

The clauses that he refers to are these; first, the 23rd clause of the local Act, by which it is enacted:—[His Lordship read it.]

Now, upon this section Mr. *Wakefield* says: "I, having become a purchaser under this Act, am entitled to say that the Commissioner made to me a sale out and out of this property, and that sale having been so made to me, it is excepted and taken out of any other clause of the Act by which any right or interest in the minerals may be reserved. And I am to be entitled to hold the whole amount of that which has been so allotted out to me entirely and completely to my own use, and discharged from either the 43rd section, or any other section which may be found in the Act reserving the minerals to the proprietor of the manor."

And, farther, he says: "In that respect I cite the *General Inclosure Act* of the 41 Geo. 3, c. 109, s. 32, which is referred to in the section authorizing the Commissioner to make this sale." And by that section it is enacted:—[His Lordship read the 32nd, and then the 40th section, and proceeded thus:—]

What is the effect, then, of these several enactments, the clause in the local Act, and the sections in the general Act? Surely it is only this: that the local Act gives to the Commissioner a certain power of dividing, allotting, and inclosing certain property—surface property, undoubtedly, reserving distinctly, as it does, the rights of the lord of the manor to all the minerals which are under that surface—and the Commissioner, as it appears to me, from the beginning to the end of the local Act has no authority or control whatever vested in him affecting in any way the minerals.

It is quite clear, and it is conceded, that he would have no

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power of disposing of or distributing the property in the mines amongst the persons who are entitled as commoners to receive allotments at the hands of the Commissioner. As regards them it is conceded at once that their rights only extend to the surface which is to be allotted to them.

But then it is said that the case is different with reference to lands sold for the purpose of paying the expenses of the Act, and that that is evidenced by the words I have just read from the *General Inclosure Act*, which says, that when this allotment shall so be made in respect of expenses, the persons who shall become purchasers shall hold it as their private property, and free from all common or other right therein, and it shall be vested in them in fee simple; but what is to be vested in them? The Commissioner is to do this: he is to select a portion of the land over which he has the power, he is not to select land over which no control is given to him; and when he has selected a portion of land over which he has power, he is to hand it over free from all common or other right thereon or therein. That means, of course, such common and other right thereon or therein as is at the disposal of the Commissioner by virtue of the Act; but he has no special power or authority given to him with reference to this particular subject matter. And the 40th clause accordingly reserves the rights of the lord or lady of the manor, such as they may be. The 44th section of the general Act provides that all the powers given by this Act shall only be effectual and binding so far as they are consistent with those of the local Act. The local Act, by the 43rd clause, most distinctly and expressly, whatever it may do otherwise as to the mode of working, reserves to the lady of the manor the whole right in all the minerals whatsoever in that which is the subject matter of the Act. Of course the circumstance of its being vested in fee simple has nothing at all do with the question of what is to pass. Whatever the purchaser takes, he takes as an estate in fee simple, free from all common or other rights thereon or therein, so far as they are rights dealt with by the Act, and which the Commissioner is competent to convey; but he cannot take anything in that portion of the land, namely, the minerals, over which, by the express words of the local Act, the Commissioner has no control whatever.

It appears to me, therefore, that the decision which the learned Vice-Chancellor came to in this case, namely, that the right to the minerals was distinctly and clearly vested in the Duke of *Buccleuch*, was a correct decision, and that the cross appeal of the Plaintiff, Mr. *Wakefield*, in the cause in that respect must accordingly fail.

But then comes a point in the case which has been much more elaborately argued, and which is open, no doubt, to a great deal more argument and discussion, but which, I think, after all is to be solved by a simple reference to the Act itself, and to the conclusions which must be derived from the several enactments contained in the Act. In the first place the case stands thus:—There is a great deal of conflicting evidence, as the Vice-Chancellor felt it to be, and as I think we must all in a great measure feel it to be, as to what was the exact extent of the power and authority of the lord of the manor, as undoubted owner of the mines and minerals, and owner also, before the inclosure, of the soil itself. What was his right at that time with reference to the working of the minerals? The lord has put his case in the argument partly in this shape: he says, my right was this—with regard to all the minerals which were situated under the wastes of the manor, as to which I was proprietor of the soil when it was uninclosed, I was entitled to work to any extent, and to let down the surface to any extent, provided I left (for his own witnesses say that he was subject to that limitation) sufficient common for the purposes to which the common was devoted, namely, the rights of the several commoners therein, either as stint of pasture, or any of the other several rights which are mentioned in the recitals contained in the preamble of the Act. That, he says, was my right with regard to the minerals under the wastes of the manor. Farther, he says: "I seek to establish by my evidence a right to work even in the inclosed grounds, making reasonable compensation for any damage that I might do by so working." If the case rested entirely upon those two propositions there might be much more difficulty in it than, I think, will be found in the result when we examine the complete provision which is made with regard to this subject matter by the 44rd section of the Act. It might be doubted, in the first place, how, after the passing of this Act, the lord could

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avail himself of any right with reference to workings under the soil causing subsidence of the soil, provided that he left sufficient common for the ordinary purposes to which it was applied when, after the passing of the Act, that particular contingency could never occur, inasmuch as all the soil was to be allotted out and divided out, and to be held in severalty as inclosed land. And therefore the case of his working with reference to leaving sufficient commonable rights was a case which could not be measured by any provision that can now be made, after the passing of the Act, inasmuch as the whole right of common, on the part of the various parties concerned, is put an end to by the Act. The whole of the property over which they once had commonable rights is inclosed, and portions of it are allotted to them. If anything could be made at all of either custom, it would be the custom which existed with reference to the working under the inclosed lands. Now the custom, as alleged, is a custom to work upon making reasonable payment; but again, unless there was something very special in the Act, saying that all these lands so inclosed should be held subject to exactly the same rights of common as the other inclosed lands, I do not think that one could safely rest any conclusion upon this part of the case as a matter of ancient custom so alleged on the part of the Duke. But we do find—I will not say an established custom, for I think the evidence is somewhat contradictory in that respect, but we find—*de facto*, whatever the custom might have been—workings going on of these valuable minerals, for valuable they appear to have been, even at the time of the passing of the Act, but their value has been largely increased by the estimation in which they are held at the present time, we find these valuable workings going on, and that the parties were brought together in the relative positions of commoners and the lady of the manor. We find that the matter was, to say the least of it, so existing *de facto*, namely, that the mines were worked, and that compensation was made. Of that we have clear evidence. Whether it was an established custom or not may, perhaps, be questioned; but *de facto* the mines were worked under the soil, and compensation was received. Whether that was done as of right, or whether it was by special agreement in each case, is a matter which is in dispute upon the evidence. And the parties might

well, when coming together before Parliament, ask the Legislature to make such a bargain between them as should for the future determine clearly and distinctly the several rights to which they should be entitled, and I think that that bargain is distinctly carried into effect in the 43rd clause.

The 43rd clause, which is the important clause for the decision of this case, and every word of which is of importance, runs thus :— [His Lordship read it (1).]

Now, here is the largest imaginable power reserved to the owners of the mines of doing that which, unquestionably, according to any custom, or by virtue of custom alone, they could not before have done, that is to say, covering the surface with any amount of buildings they might think proper, and covering the surface with any amount of minerals which they might think proper to deposit, and cutting the surface into as many streams and other channels as they might think right; and farther than that, to make pits, and to make soughs, and to make tunnels, all which, of course, must be under the surface. All these may be made without any limit or stint whatever. And to do that which, if the soil existed as common before, must have entirely destroyed the soil for any commonable purpose, namely, the staking of minerals upon the ground, or still more, the building of permanent houses for workmen, and the erecting of houses for smelting the ore, and the like, must have destroyed the surface for any purpose whatever of common. All that they are entitled to do; and, farther, they are entitled to drive underneath the surface all those pits and soughs and tunnels and the like.

It appears to me that although the wording of that clause has given rise to very fair argument, namely, that it comes in the shape of a reservation at the beginning, and that there are at the end of the clause the words by which it is said that they shall do it in the same manner as if this Act had not been passed, both of which things, are, no doubt fairly arguable points, as indicating that what was intended to be done was not any extension of right, but simply a reservation of right; yet I think it is impossible to come to that conclusion when you find that the works to be done go beyond anything which those who support the case of the lord of

(1) See *ante*, p. 381.

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the manor have attempted to prove in the evidence, namely, a total destruction of the surface for an indefinite period by the erection of buildings and otherwise. And, on the other hand, there is very large power given of working underneath the surface in all those wastes which are in future to be inclosed. And farther, and most of all, has it weighed upon my mind as an important consideration, that if this simple reservation of right had been all that was intended, it could have been effected in five lines instead of requiring all this minute and elaborate description of powers and privileges. All that would have been necessary to be said would have been simply saving and reserving to the lord or lady of the manor all such right in the minerals as they had prior to the passing of the Act. One cannot but come to the conclusion that it was the intent of the Legislature, and the intent of all the parties to this Act, as evidenced by this clause, that there should be given the fullest and completest power of working these valuable minerals, but that that power should be fettered by the condition (a most important one undoubtedly) contained in the end of the clause—that those who worked the minerals should make compensation for all such injury as might be occasioned by the acts necessary to the proper working of the mines.

Taking this view, I confess that I have not thought it necessary to go minutely through those authorities which the learned Vice-Chancellor in the Court below examined in great detail. He enunciated in the first place a principle in which, I confess, that I cannot entirely acquiesce; he said that the evidence brought his mind to this conclusion—that these mines could not be worked at all if Mr. *Wakefield* was right in his contention, and if the ground and surface could not be let down; that it was impossible that the two parties could both enjoy the rights they sought to enjoy, the one the right to the soil, and the other the right to the minerals; that the two conflicted, and it became a distinct conflict of right as to which of the two was to give way. He enunciated as a principle, that he should be disposed to say, that inasmuch as the mines had never been worked or enjoyed by man, and the surface had been enjoyed by man, the right of the mineral owner must give way to the right of the owner of the surface. That certainly is a general proposition which, I confess, does not help one much to a solution of

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the case. The rights of the parties, I apprehend, must be determined according to what we find in the instruments creating these rights, or in the customs, if there be any, which may be proved in support of those rights. I apprehend that these rights cannot be rested upon any such abstract principle as that. In a case where, as is proved here, the owner had originally in himself both the soil and the minerals, subject, as in the case of these commons it was subject, to certain commonable rights, one has to investigate how these particular rights have been adjusted and affected *inter se;* and if one finds that they have been adjusted in such a manner as is not inconsistent with a true and sound construction of the instruments which affect those rights, then I apprehend that the only course is to adhere to those instruments.

The Vice-Chancellor went through that class of cases of which *Hilton* v. *Lord Granville* (1) is the leading instance. Whether the authority of that case would now be fully recognised or not, I do not stop to inquire. In that case it was determined that a custom to work mines and minerals in such a manner as to destroy the surface which has been granted out to another is not a reasonable custom, in a case in which there is no allegation of its being a part of the custom that compensation should be made for the injury and damage that may be done. Now, without considering the present authority of that case of *Hilton* v. *Lord Granville* (1), a certain *dictum* occurs in that case which has been entirely set aside by a subsequent case in the House of Lords, the case of *Rowbotham* v. *Wilson* (2), namely, the *dictum* that if a deed could be produced containing such a grant as was there necessary to be presumed in order for the Defendant to establish his case, the deed itself would not be considered reasonable, because such a deed would be inconsistent with the right granted. That *dictum* has been entirely overthrown; and, as far as regards the case before us, there is nothing whatever unreasonable in the construction which is put upon the Act of Parliament. There is nothing at all unreasonable in saying that a man who has a very valuable right which he is anxious to secure should be allowed by Parliament to retain the exercise of that right to its full extent, provided that he does not destroy other rights which, by the same Act of

(1) 5 Q. B. 701. (2) 8 H. L. C. 348.

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Parliament, are conferred upon other people, namely, the rights of the persons entitled to the surface, without, for such destruction, making full and complete compensation. Of course that brings the whole matter to a very reasonable construction. The person who purchases the property knows how he purchases it; he is not to be interfered with at all in the rights which he purchases; he may build upon it as much as he pleases, and if the lord, the mine owner, comes to let down the soil so as to damage those rights which have been exercised upon the soil by virtue of the fee simple vested in the proprietor of the soil, the mine owner will then, for such injuries as he inflicts, have to make compensation, which is to be ascertained in the usual manner if there be any difference upon that subject between the parties. And there is nothing unreasonable or improbable in the intention which I have endeavoured to deduce from the clause in the Act of Parliament. It appears to me that that clause would be entirely vain and futile if it had been merely intended as a reservation of rights exactly as they existed before—a reservation which, as I have said before, might have been contained in five lines instead of some forty or fifty.

I think, therefore, that, according to the true construction of the Act, the Duke of *Buccleuch* was entitled to do that which he was doing, and that that portion of the Vice-Chancellor's decree which restrains him and his tenants from exercising their right to work minerals under the lands of the Plaintiff must be reversed. And I should suggest to your Lordships farther, that inasmuch as Mr. *Wakefield's* case fails entirely, his appeal should be dismissed with costs.

As regards the case of the Duke of *Buccleuch*, the decree should be altered in the respect I have mentioned, but there should be no costs of the appeal.

LORD CHELMSFORD:—

My Lords, in these appeals from the decree of Vice-Chancellor *Malins* I will first consider that of the Appellant *Wakefield* against so much of the decree as declares that the Duke of *Buccleuch* and *Queensberry* is absolute owner of all mines and minerals and

quarries whatsoever upon, with, or under the lands of the Appellant, situate in the manor of *Plain Furness*.

The Duke of *Buccleuch* and *Queensberry* is lord of the manor of *Plain Furness*, and owner of the mines and minerals generally throughout the manor. The Appellant *Wakefield* is owner of thirty-six acres, formerly part of the wastes of the manor, which were sold under an Inclosure Act passed in the year 1821, for inclosing certain moors, commons, and wastes within the manor of *Plain Furness*, for the purpose of defraying the expenses of the Act. The question upon this appeal is, whether the allotment by the Commissioner appointed under the Act passed to the purchaser from whom the Appellant derives title, the mines and minerals, together with the surface of the land.

By the 23rd clause of the Act, the Commissioner is empowered to set out and sell such parts of the said moors, commons, and wastes as in his judgment shall be necessary to be sold, in order to raise money for paying the charges and expenses of carrying the Act into execution. By the 32nd section of the *General Inclosure Act* (41 Geo. 3, c. 109) it is enacted, that lands sold for the purpose of paying the expenses attending upon any Inclosure Act shall be absolutely discharged of and from all common and other right thereon or therein, and be vested in fee simple in, and be inclosed, and thenceforth held in severalty by the purchaser thereof as his private and absolute property.

If the Appellant's right to the mines and minerals under his land had depended upon the *General Inclosure Act*, there could be no doubt that by the allotment made upon the sale for defraying the expenses of the Act, every part of the land in question, as well beneath the surface as the surface itself, would have become the absolute property of the purchaser. But the special Act incorporates with it only such of the provisions and regulations of the *General Inclosure Act* as are not repugnant to, or controlled by, or otherwise provided for, by any of its clauses and provisions; and the 43rd clause of this Act saves, excepts, and reserves to the lady of the manor, and to the person for the time being entitled to the manor, all mines, minerals, and quarries already found, or hereafter to be found, upon, with, or under the lands and grounds thereby directed to be divided and inclosed. The power of the

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Inclosure Commissioner, therefore, was confined to the surface of the lands to be inclosed, and he could not pass to the purchaser of the land in question the mines under it, if it was part of the lands which by the Act were to be divided and inclosed.

It was argued by the counsel for the Appellant that land sold to raise money for paying the expenses of the Act could not be part of the lands to be divided and inclosed, because one of the things to be done by the Commissioner before the division and inclosure was to set out lands for this purpose, and therefore the lands so sold were taken away from those which were to be divided and inclosed, to which only the reservation of the mines under them extended. But this argument, in my opinion, cannot be sustained. For what are the lands which, by the 23rd section, are to be set out by the Commissioner for the purpose of defraying the expenses of the Act? They are "parts of the said moors, wastes, and commons," *i. e.*, of those moors, wastes, and commons which were to be divided, allotted, and inclosed. And the reservation of the mines applies to the lands and grounds (*i. e.*, to all the lands and grounds) directed to be divided and inclosed. This must include the lands sold to pay expenses, because, possibly, no part of the lands would be required to be sold, but the whole of them might be allotted to the lord, and to those who had rights of common.

It was farther contended that the purchasers of land sold to defray the expenses of the Act must be absolute owners of the whole of the land without any exception, because, by the *General Inclosure Act*, they are to hold in fee simple, absolutely discharged from all common and other rights. And their interest in the lands so purchased was contrasted with that of the customary tenants, whose allotments under the special Act were to be held in free and common socage. But the tenure by which the purchasers are to hold the land cannot have any effect in determining what was to be held; whatever passed to the purchasers under the Act belongs to them in fee simple. It was said by the counsel for the Appellant that the words "the lands to be divided and inclosed" occur only in the 43rd clause, which contains the reservation of the mines, and in the 34th clause, which provides for the payment of the expenses of the Act. And it was argued that, as the 34th clause cannot apply to the purchasers of land sold to pay expenses,

they must equally be excluded from the operation of the 43rd clause. The 34th clause enacts, that in case the money for the sale of allotments shall not be sufficient to defray all the charges and expenses, the deficiency shall be made up "by the several persons interested in the lands and grounds thereby intended to be divided and inclosed." It was observed that here was no exception of persons who had purchased lands sold to pay expenses, and yet that the 34th clause could not apply to them, as, if they were liable to contribute, they would pay more than their purchase-money. But it appears to me that there is no difficulty in determining that this clause does not extend to them, and yet that the reservation of the mines is applicable to their lands. Is it clear that the words "hereby *intended* to be divided and inclosed" are merely descriptive? For the clause can have no operation until the actual division and allotment has taken place. It is only after the allotments have been made that it can be ascertained whether there is a deficiency in the money arising from the sale of the allotments. And it is the evident intention of the Act that the deficiency shall be made up by the allottees themselves, who are described by the words "the several persons interested in the lands and grounds hereby intended to be divided and inclosed."

In the course of the argument upon this point, it was suggested that as by the 23rd clause of the Act persons interested in the allotments might, if they pleased, pay a share of the expenses of the execution of the Act; if all agreed to pay the whole of the expenses the lord might be deprived of all his mines. To this suggestion the learned counsel for the Appellant, *Wakefield*, said he could give no answer. But the answer to this supposed case is obvious. If the expenses were paid by all or any of the allottees there would be no sale of any of the land; but each party so paying would be entitled to a larger allotment, and the right of the lord to the mines would not be in any way affected.

In support of the Appellant's right to the mines, reliance was placed on the 24th section of the special Act, by which the lord of the manor is to have an allotment of one-sixteenth part of the moors, commons, and wastes, as a compensation for his right and interest in and to the soil of the same. It was argued that the word "soil" was comprehensive enough to include everything to

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which the lord was entitled in, over, or under the moors, commons, and wastes. But whatever may be the force of this word, unqualified and unexplained, it cannot have the effect contended for as it is used in the special Act. It is, perhaps, unnecessary to go farther than to the 1st section of the Act for proof of this. It recites that "the Duchess Dowager of *Buccleuch* and *Queensberry* is lady of the manor of *Plain Furness*, and, as such, is entitled to the soil of all the said moors, commons, and wastes, and to all mines, minerals, and quarries, of what nature and kind soever, within or under the same." I should have thought, as the soil and the mines are here expressly distinguished from each other, that the 24th clause, considered alone, would have been sufficient to shew that the compensation to the lord was confined to his right and interest in the surface soil. But when to this is added the reservation of the mines by the 43rd clause, there cannot remain a shadow of doubt as to the limited application of the compensation clause. If the construction of the 24th clause contended for were to prevail, the lord would be deprived of that portion of the mines which lies under the Appellant's lands, without receiving any consideration in return.

I am of opinion that that part of the decree of the Vice-Chancellor which declares that the Duke of *Buccleuch* and *Queensberry*, as lord of the manor of *Plain Furness*, is absolute owner of the mines, minerals, and quarries upon or under the lands of the Appellant, ought to be affirmed.

I have next to consider that part of the decree from which the Duke of *Buccleuch* has appealed, by which it is declared that the Duke of *Buccleuch* and *Queensberry*, and *Miles Kennedy* (his tenant) are not, nor is either of them, entitled to work the mines or minerals under the Plaintiff's lands situate in the manor of *Plain Furness* so or in such manner as to cause a subsidence of the surface or soil thereof; and by which a perpetual injunction is awarded to restrain the working the mines or minerals so as to produce this effect.

Upon this appeal two questions have to be decided: first, whether the mines can be properly and effectually worked without causing a subsidence of the soil; if not, secondly, whether the Duke of *Buccleuch*, or his tenant, is entitled to work the mines, and so in-

juriously affect the Respondent's lands, paying compensation for any damage occasioned by such working.

The first question is one entirely of fact, upon which there are a great many affidavits of witnesses on both sides. The result of the evidence appears to be that the mines are of hematite iron ore of an extremely friable nature, lying in irregular beds, which sometimes are not found till depths of superincumbent rubbish of gravel, clay, and boulder stones, and other loose materials, have been pierced. Great numbers of scientific witnesses describe in their affidavits the character of the ore, and the ordinary mode of working the mines, and state that no method of working them without causing a subsidence of the surface could be devised, and that the effect of a prohibition to let down the surface would be equivalent to putting a stop to all mining within the manor. The witnesses for the Respondents state, that although the mode adopted in working the mines must inevitably let down the surface, yet that this consequence might be obviated by pursuing a different system, which they describe. But the witnesses for the Appellant say that the method of working proposed is wholly inapplicable to mines of the peculiar character of those in question.

Upon a consideration of the evidence, I agree in the conclusion at which the Vice-Chancellor arrived: "That the mines cannot be effectually worked without causing a subsidence of the surface, and that the effect of allowing the injunction to stand will be to stop the working of the iron ore in the district without the consent of the owners of the surface."

This leads at once to the second question upon this appeal, whether the Duke of *Buccleuch* or his tenant has a right to work the mines, paying compensation to the Appellant for any damage to his lands occasioned by the working.

The Vice-Chancellor, having found that the rights of the Appellant could not be fully exercised without prejudice to the Respondent, proceeded to consider in this conflict of rights which of them must give way to the other, and he gave it as his opinion that, "upon principle, if there had been no authority, the surface, having at all times been enjoyed by man, must be protected at the expense of the mines, which have never yet been so enjoyed, and that the mines must be regarded as a tenement subservient to the surface."

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It is difficult to imagine a case in which this principle can be thus, abstractedly, applied. The surface of the land, and all beneath it, must originally have been the property of one and the same person. He was, of course, at liberty to grant the surface, reserving the minerals, or to grant the minerals only, retaining the surface. In either case the grant might be made upon conditions, which would be proved by the grant itself, or established by evidence of the invariable exercise of the respective rights of the parties. If no proof could be given of the mode in which each party was to enjoy his property, the owner of the surface might prevent the owner of the mines working so as to take away the support from the surface, and the owner of the mines would be entitled to all the minerals which he could obtain by ordinary and proper working without obstruction by the owner of the surface. The only principle which could be applied in the case last supposed is contained in the maxim "*sic utere tuo ut alienum non lædas.*"

This case, however, is not to be determined upon any general principle, but the Duke of *Buccleuch* must establish his right to work his mines, notwithstanding the inevitably injurious consequence to the Respondent's surface, by proof either of a custom within the manor, or of an authority derived from the Act for inclosing the wastes of the manor.

A great deal of evidence was produced of a custom within the manor for the lord to work the mines under the customary tenements, paying for any injury occasioned by his working a compensation of three times the amount of his rental to a tenant, and twice the agricultural value of the land injured to an owner.

But we have nothing to do in this case with the custom applicable to customary tenements within the manor. The question turns entirely upon the extent to which the lord has a right to work his mines with reference to the wastes of the manor.

As to these evidence was given of a custom to work the whole of the mines and minerals under the wastes mentioned in the Inclosure Act, notwithstanding by such working the superincumbent soil and surface were caused to subside and fall, provided a sufficiency of common was left for the commoners.

There is some doubt whether this custom was proved, as there

had been no working under the wastes within the manor at the time of the passing of the Inclosure Act. The witnesses, therefore, who speak to the custom could not have had any knowledge of acts by which such custom could alone be established. With respect to the custom pervading the district in which the manor of *Plain Furness* is situate, there seems to me to have been hardly sufficient proof of such a connection between the different manors as to render a custom in one manor evidence of the same custom existing in another. But it seems to me to be immaterial whether a custom of the kind alleged was proved or not, because the lord, unless there is proof to the contrary, would be entitled to do all that the custom allows. He is entitled to the whole of the mines under the wastes, and he cannot be prevented working them so as to get all the ore which can be obtained without injury to the commoners; and if the commoners have a sufficiency of common left they sustain no damage. On the other hand, the lord has no right to work his mines so as either actually or virtually to destroy the common by letting down the surface so as to render it inaccessible to the cattle of the commoners.

But assuming the custom applicable to the wastes to be fully proved, I am at a loss to see what benefit the Duke of *Buccleuch* can secure from it in the present suit. He claims to have a right, in working his mines, to let down the surface of Mr. *Wakefield's* land, formerly part of the wastes of the manor, paying him compensation for any injury sustained. How can this right be established by proof of a custom for him to work under the wastes, leaving a sufficiency of common for the commoner? The Duke of *Buccleuch's* power of working his mines under Mr. *Wakefield's* land cannot (as appears) be regulated by any custom, but the respective rights of the parties must be governed by the provisions of the Inclosure Act.

The learned counsel for Mr. *Wakefield*, in the course of his argument, said he would assume as against himself that the Act gave the lord the same right to let down the surface as he had before, but that it could not give him a greater right. I do not see, however, how it is possible to compare the right given to the lord by the Act with that which he had previously possessed. The former right is taken to have been a right to work the mines,

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leaving a sufficiency of common. But by the Act the commons are extinguished, and therefore it is no longer possible to determine the extent to which the mines may, properly, be worked by a standard which has ceased to exist. The Act has certainly created a different right in the lord over the inclosures from that which he previously possessed with relation to the wastes; and what that right is must be determined by the Act itself.

The whole question depends upon the 43rd clause. That section begins with a reservation, in the fullest and most comprehensive terms, of all mines, minerals, and quarries under the lands to be divided and inclosed. This has been already shewn to include lands which were sold for the purpose of defraying the expenses of the Act. The section then proceeds to give most extensive power to the lord, as owner of the mines, over the surface by empowering him at all times of the year to enter into and upon the lands directed to be divided and inclosed, to search, bore, and dig for mines and minerals, and to sink shafts and open veins or quarries, and to deposit the minerals on the land, and continue the same as long as he shall think proper, and to carry the same away over the lands, and for that purpose to open gaps in the fences, and to make and continue horse and carriage and footroads over the lands when and so often and so long as he shall think proper, and to divert and turn any rivulet, brooks, or streams of water over the lands for better working the mines and minerals, and to sink and drive pits, quarries, levels, soughs, saflights, tunnels, and other necessary works within or upon the said lands, and to erect habitations for workmen and others employed about the works in smelting and refining or manufacturing the minerals, and also to do all farther and other acts and things whatever for getting the said mines and minerals and carrying on the works thereof, and disposing of and carrying away the same, in as full and ample a manner to all intents and purposes as could or might have been done if the said lands had remained open and uninclosed, or this Act had not been passed, yet nevertheless making reasonable compensation for damages done by said works to the person sustaining such damage.

The learned counsel for Mr. *Wakefield* contended that this clause having enumerated various things that the mine owner

might do upon the surface, and then having added the general words "all farther and other acts and things," &c., these words must be construed to mean acts and things *ejusdem generis, i.e.*, to be done upon the surface. They also observed that there were no express words saying that the mine owner should be at liberty to get the mines from under the surface; and that although proof was given of a custom for the lord to mine under the wastes, leaving a sufficiency of common, yet he had not proved that he could have mined under the *locus in quo* and destroyed the surface, and still have left sufficient common for the commoners.

But if the general words "all farther and other acts and things," are to be confined to works on the surface, it is difficult to conceive where there can be any room for their application after the full specification previously made of every imaginable way in which the surface may be disturbed; and no mode of underground working could more effectually destroy the Respondent's land than the exercise of most of the powers conferred upon the lord by the Act.

It is clear to my mind that the 43rd clause cannot be restricted in the manner suggested, because the powers given are, many of them, necessarily connected with underground workings. Amongst others, the lord is empowered to sink and drive pits, quarries, levels, tunnels, and other necessary works, for the better working and getting the mines and minerals. Now, although these works may commence on the surface, yet they can be made with no other object than to facilitate the working underground. This right is therefore, by necessary implication, if not expressly, given to the lord by the Act.

As to the objection that no proof was given by the lord that he could have mined under the Appellant's land, and still have left a sufficiency of common, I apprehend (as I have already remarked) that all rights in relation to the wastes are swept away by the Act, and others of a totally different description substituted. The Act, indeed, seems to refer to these as a measure of the powers to be exercised by the lord, by stating that he may do all farther and other acts and things "in as full and ample a manner to all intents and purposes as could or might have been done if the said lands had remained open and uninclosed, or the Act had not been

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passed." But these words cannot be taken as a qualification or limitation of the powers previously conferred; for there is no one of the acts and things specified in the Act which the lord would have had a right to do as against commoners. Although he might approve under the *Statute of Merton*, yet I apprehend he would not be at liberty to dig for minerals in quarries, or sink pits, or build houses upon the wastes, although he left sufficient common, without proof of a custom authorizing him to do these things. The rights and powers given to the lord by the Act are such as he did not previously possess. They are such as in their unlimited exercise may be entirely destructive of the whole surface of the Respondent's land. But the Legislature has thought proper to confer these rights upon the lord, subject to the condition of his making a reasonable compensation to the landowner for the damage occasioned by his acts.

The view which I have taken of this case removes it entirely from the ground on which the Vice-Chancellor has placed his decision. His Honour, at the commencement of his elaborate judgment, stated that the reservation of the mines in the 43rd clause of the Act being totally silent as to any right of the lord to let down the surface in his mining operations, that question must be decided by the general law. He then considered at great length the various cases applicable to the subject, and arrived at the conclusion that the case of *Hilton* v. *Lord Granville* (1), which decided against a custom for a mine owner to work his mines so as to let down the surface, paying compensation to the person so injured by his mining operations, was a decision the authority of which was unshaken, and that it bound him to decide against the lord upon the alleged custom.

But (as I have already observed) the custom upon which the Vice-Chancellor proceeded is applicable to the customary tenements of the manor, and has nothing whatever to do with the right of working the mines with reference to the wastes. Even then, if *Hilton* v. *Lord Granville* (1) is an authority that where there is nothing to shew for the right but a customary exercise of it, the custom cannot be supported (which, I think, is open to question) yet the *dictum* of Lord *Denman* in that case, that a grant in specie,

(1) 5 Q. B. 701.

to the effect of the custom, could not be supported, has been since overruled.

In the present case, by the express words of an Act of Parliament, which is at least equivalent to a contract, power is given to the lord to carry on the works of the mines to an extent which may reach to the utter destruction of the land above, making compensation for the damage done to the owner of the surface. The purchaser under the Inclosure Act must be taken to have known its provisions, and that he would be subject entirely to the will of the mine owner, and he must have regulated the offer of his purchase-money accordingly. Nor, upon consideration, is there any such hardship upon him as there would at first sight appear to be: for even if the whole surface is destroyed, he gets full compensation for it, and the money is a substitute for the land of which he is deprived. And if he chooses to erect buildings upon the land under the precarious conditions to which they would be exposed, and the lord thinks it more profitable to work his mines, and pay for the buildings (which probably, in most cases, would not be his interest to do), he would still get his compensation. And at all times the lord and the owner of the surface can easily make such arrangements as to the exercise of their respective rights as might be for their mutual advantage.

I am of opinion that so much of the decree of the Vice-Chancellor as the Duke of *Buccleuch* has appealed from ought to be reversed.

LORD COLONSAY:—

My Lords, in regard to the appeal of Mr. *Wakefield* I entirely concur in the views which have been stated. He comes here as the owner of lands that were sold under the powers and provisions of the local Act. The powers of that Act extend to the surface of the lands, and the division of the commonable rights. No doubt there is a general Act which, if it be not controlled by any clause in the special Act, would give to the Appellant, Mr. *Wakefield*, a stronghold in regard to his present contention. But it appears to me that the sections of the general Act, if imported into the case, would be inconsistent with, and repugnant to, the pro-

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visions of the local Act, under which the sale of this land took place. I therefore think that Mr. *Wakefield* cannot succeed in his appeal.

Then, with regard to the more difficult question, as to the power of the owner of the mines, the Duke of *Buccleuch*, to work them so as to injure or destroy the surface, it appears to me that, in regard to that power also, we must look to the local Act which put in motion the division of the property, the division of the surface, and see how that Act has dealt with the owner of the mines. I assume that the working of the mines profitably would be, in most cases, very injurious, perhaps almost destructive of the property of the owner of the surface, especially if buildings were erected upon it. But then, the Act has reserved the mines to the owner of the mines; and it has given him liberty to work them, and to do all those special things which are mentioned in the 43rd clause; it has given him full liberty and power to do that under the condition of paying damages to those who suffer from it. Now, it appears to me that His Honour, the Vice-Chancellor, in dealing with the case, has set aside very much that view of the matter, and has proceeded on the general rule of law as to the ordinary interests of owners of mines and owners of the surface. But if we find, in the particular Act which dealt with the division of this common, these powers reserved and given to the owner of the mines, I think it is quite out of rule to go in search of any other sources for determining the interests of the parties. The fact that injury may be done, that there may be even destruction of the value of the surface, I do not look upon as a matter that ought to weigh materially in this case; because the Act itself has provided compensation to be given to the owner of the surface; and, however great the injury that may be done, he is entitled to compensation for it. The result of that probably will be, that the owner of the mines will not exercise his powers in such a way as will bring him into the predicament of paying compensation exceeding the value of what he is to get by working the mines. But the owner of the surface is not deprived of redress; on the contrary, it is provided for him by the Act of Parliament; and I think, therefore, that it is the Act of Parliament which ought to guide us in this case. The right of the owner of the mines to work the mines is made

tolerably clear—so clear, indeed, that I think it overcomes all the difficulties that have been raised against it.

THE LORD CHANCELLOR:—The result will be, that the bill must be dismissed. It has occurred to me that the part complained of by Mr. *Wakefield* was a decision against him so far—but in the subsequent part of the decree the Court thought that Mr. *Wakefield* was entitled to a remedy, but not put so widely and upon such high ground as he put it upon; it was put upon a distinct ground. The result of our decision is, that we follow the Vice-Chancellor so far as to say that he is right in holding that Mr. *Wakefield* had no right upon the first ground; but we differ from the Vice-Chancellor in his holding that Mr. *Wakefield* had the right he claimed upon the second ground. The consequence is, that Mr. *Wakefield's* appeal fails *in toto*, and that we reverse the decision of which the Duke of *Buccleuch* complains. The bill should have been dismissed in the Court below, and we must, therefore, direct that the bill should be dismissed with costs.

Decree, so far as complained of in the appeal by the Duke of Buccleuch, reversed; so far as complained of in the cross-appeal by Mr. Wakefield, affirmed. Bill ordered to be dismissed with costs.

Lords' Journals, 25th March, 1870.

Solicitors for the Duke of *Buccleuch*: *Nicholl, Burnett, & Newman.*

Solicitors for Mr. *Wakefield*: *Gray, Johnston, & Mounsey.*

1869
June 28, 29.
1870
Feb. 18;
April 4.

LOUIS CASTRIQUE . . . . . { PLAINTIFF IN ERROR;

AND

WILLIAM IMRIE AND W. J. TOMLINSON . { DEFENDANTS IN ERROR.

Ship—Bill of Exchange—Proceeding in Rem—Foreign Court—English Law—Maritime Lien.

6 QB 139, 152-3
6 C B 239.
4 P C 151-7,
1 C P D 361-8,
370-1
4 P D 33,
6 P D 110.

Where a foreign Court, having competent jurisdiction in the matter, and honestly exercising it, delivers, in a proceeding *in rem*, a judgment, by which the sale of a chattel (a British ship then lying in the foreign port) is ordered, the sale cannot afterwards be impeached in this country in an action against the vendee, even though the person seeking to impeach it would, by the law of this country, have a preferential title to the chattel here.

A ship was, while in a port of an English colony, repaired and furnished with necessaries for the voyage. The captain drew on his owner for the amount due. The bill was never accepted. The ship sailed on its prescribed voyage, and before reaching *England* entered a French port. The bill was indorsed to a French subject, who sued the captain on it, and obtained in the *Tribunal de Commerce* a judgment against him, but the judgment freed him from personal arrest and declared the debt "privileged on the ship" (having priority over others). The ship was taken possession of by the French authorities under this judgment. While the ship was on its voyage, and before its arrival in the French port, the owner had executed a mortgage of the ship to a creditor. Neither the original owner nor the mortgagee was in any way personally cited in the action. The ship could not be actually sold till the Civil Tribunal of the district had confirmed the original judgment. It was confirmed, after the original owner and his assignee (for he had in the meantime become bankrupt) had been cited before the Civil Tribunal, and that Court disregarded the opinion of an English lawyer as to what would be the relative rights of the holder of a bill of exchange and the holder of a bill of sale of the ship. The assignee of the mortgage afterwards instituted before the Civil Tribunal a process in the nature of a replevy of the ship, but failed in the process, and the ship was sold:—

Held, that there had been a judgment *in rem* in the French Court, and that the title of the vendee of the ship (an Englishman), could not afterwards be disturbed in this country.

Per LORD CHELMSFORD:—A proceeding in a foreign Court to enforce a maritime lien, which by the law of that foreign country and of all foreign codes founded on the civil law, though not so recognised by the law of this country, is a proceeding *in rem*, must be so treated here.

DURING the year 1853, and up to the 30th of November, 1854, *John George Claus*, a British subject, was the registered owner of

the ship *Ann Martin*, registered at *Liverpool*. In December, 1853, the ship sailed from *Liverpool* on a voyage to *Melbourne*, and was to sail thence to *Madras*, under the command of one *William Benson*. At *Melbourne* the ship was supplied by Messrs. *Levien & Stenetz* with what were admitted to be necessaries, and, in payment for them, *Benson* drew a bill on *Claus* for the sum of £601 16*s*. 6*d*. This bill did not arrive in *England* until *Claus's* bankruptcy, and was never accepted, and when at maturity was dishonoured. On the 30th of November, 1854 (the ship being then in due prosecution of its voyage), *Claus*, executed, in *England*, a mortgage of the ship with a power of sale, in favour of one *Thomas Harrison*, in part payment of a bill for £4000, which mortgage was duly registered at *Liverpool*, on the 2nd of December, 1854. On the 2nd of February, 1855, *Harrison* executed a bill of sale of the ship to *Richard Emley*, who, on the very next day, registered himself as owner. On the 9th of April, 1855, *Emley* executed a bill of sale of the ship to *Louis Castrique*, who did not at that time take any steps to register himself as owner. On the 4th of May, 1855, the ship, according to instructions received by the master while he was at *Melbourne*, went to *Havre*. On the 10th of May, 1855, while the ship was at *Havre*, *Claus* became bankrupt. The bill for £601 16*s*. 6*d*. had, in the meantime, been indorsed to Messrs. *Trotteux & Co.*, of *Havre*, French subjects, and they, whilst the ship was still in that port, commenced in the Court of the Tribunal of Commerce there, a suit against *Benson* on the bill. *Benson* was cited and appeared, but did not defend the suit; but allowed judgment to be taken against him, and on the 15th of May, 1855, the judgment was formally recorded. This judgment recited that "the bill in question was drawn by *Benson*, in his capacity of captain of the vessel *Ann Martin*, in payment for necessaries supplied to that vessel; and that there is occasion to grant his prayer to be protected from personal arrest." It went on thus: "The Tribunal condemns *Benson* in his quality of captain of the vessel *Ann Martin*, and *by privilege on that vessel* (1), to pay

(1) *Et par privilége sur ce navire.* What this phrase meant was never clearly explained. The Court of Commerce has no power in an action on a bill drawn by the captain, but not accepted by the owner, to make the vessel of the owner the fund from which the bill is to be paid. The words

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to the Plaintiffs the sum of £601 16*s.* 6*d.*, the amount of the bill," &c., with interest and costs. No summons in the suit had been served on *Claus*, *Harrison*, *Emley*, or *Castrique*, nor had they, nor, by the law of *France*, was it deemed necessary that they should have, any such summons, or any opportunity of appearing in the suit. The ship was, under this judgment, seized in the port of *Havre*, and detained in the custody of the Court. The ship, however, could not be sold till this judgment of the Tribunal of Commerce had been ratified by the Civil Tribunal of the same district; and the persons appearing by the ship's papers to be the owners of the ship were entitled to appear and be heard before the Civil Tribunal. *Claus*, and his official assignee *Bird*, as well as *Benson*, the master, accordingly received notice to appear; they did not appear, and the judgment of the Tribunal of Commerce was, on the 15th of August, 1855, confirmed, and a sale of the ship ordered. Notice of this final judgment was served upon *Bird*, the official assignee of *Claus*, but he never appeared, in person or otherwise, before the Tribunal. After the delivery of this final judgment, *Castrique* (who had, though not formally, been made aware of these proceedings), upon the 22nd of September, 1855, commenced a suit in the Civil Tribunal of *Havre*, in the nature of a suit to replevy the ship; the facts were then fully proved, and evidence of the law of *England* on the subject was given to the Civil Tribunal.

The Civil Tribunal, on the 19th of April, 1856, gave judgment against *Castrique* (1). *Castrique* appealed against this judgment to

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would seem, by reference to the 191st section of the *Code de Commerce*, to indicate that the Plaintiff in the action was considered a creditor entitled to priority over others.

(1) The Civil Tribunal pronounced a judgment, of which the important parts are the following:—"Whereas *Trotteux* and others, bearers of bills drawn by *Benson*, master of the English vessel the *Ann Martin*, on *Claus*, who alone appeared as owner of that vessel on the certificate of registry in the possession of the captain, have caused the captain to be condemned to pay those bills, and have, in consequence, caused the vessel to be seized in the port of *Havre*. That the replevy of the process is demanded by *Castrique*, bearer of a deed which, during the voyage of the *Ann Martin*, was entered into by *Claus*, in favour of *Harrison*, assigned by *Harrison* to *Emley*, and by the latter to *Castrique*. Whereas the nature of the deed which has been called 'mortgage' according to the English law, is of little importance in the case; whether it constitutes a real sale or only an apparent sale, or a security surrounded by certain peculiar

the Court of Appeal at *Rouen*, and, in addition to the other documents, furnished the Court with an opinion of Mr. Attorney-General *Cockburn* (1). The Appeal Court, however, on the 3rd of March,

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privileges derived from the foreign law under the authority of which it was executed, the decision must be the same. That the question at issue mostly concerns the property in a vessel sailing under the name of *Claus* as owner; that it is impossible to believe that under any commercial law whatsoever, it could be allowed that, during the continuance of a voyage, such property may be conveyed to a third party, or mortgaged to him by way of security, without there appearing on the papers of the vessel any trace of that conveyance or modification of the property; that good faith, which is the soul of commerce, is contrary to such an idea; that the French law requires it by enacting that the voluntary sale of a vessel in the course of a voyage does not prejudice the rights of the creditors of the vendor (Art. 196, *Code de Commerce*), that the English law contains an analogous enactment, since by that law a similar sale is only effective when it has been recorded by indorsement on the certificate of registry, and entered at the port of registry shortly after the ship's return; that the indorsement in this case has not been made: that one of the conditions required for the validity of the sale, or of the unnamed deed on which *Castrique* founds his right, has not been fulfilled; that the deed cannot, therefore, be opposed to the parties who have treated with *Benson* representing *Claus*; that the claim of *Castrique* is, therefore, not allowable: that, consequently, he has no right to question the acts of *Trotteux & Co.* and the documents with which they are furnished; that the proper opponents of *Trotteux & Co.*, viz. the assignees of *Claus*, have been called in the cause; that they do not appear; which fact leads to the presumption that they have no objection to raise to those acts." It then recited the recent French law, which "allowed French subjects to buy and naturalize foreign vessels," and directed the payment to *Trotteux & Co.* of 500 fr. for damages and costs, in the event of the sale of the vessel not realizing sufficient to satisfy them.

(1) This opinion declared the French tribunals to have mistaken the English law. By the bill of sale forfeited under the 8 & 9 Vict. c. 89, s. 37, *et seq.*, the mortgagee had a specific lien, valid against the assignees of the bankrupt, notwithstanding that the ship continued on its voyage in the reputed ownership of the bankrupt. The indorsement on the certificate of registry was not necessary to pass the property. A mortgage was, at law, an absolute conveyance of the property, defeasible only on payment of the sum lent on a given day. The law of foreign codes, founded on the civil law, gave a lien on the ship for money advanced for repairs and necessaries, without any express hypothecation. But by the law of *England* there was no such lien on the ship (*in rem*) except under a bottomry bond. Such hypothecation the master might, in a case of necessity, enter into in a foreign port: *Johns* v. *Simons* (2 Q. B. 429); but if not entered into at that moment, and if the money was really advanced on the personal credit of the master, he could not afterwards hypothecate the ship: *Addison* on Contracts, p. 289. A bill of exchange drawn on the owner would not effect hypothe-

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1857, gave a judgment in these terms:—"Adopting the reasons which had guided the previous judges, we confirm the judgment of the Civil Tribunal of *Havre*, and condemn the Appellant in the penalty [damages] and costs." *Castrique* effected a registry in his own name as owner on the 13th of April, 1857. The sale took place on the 29th of May, 1857; he attended it, but did not lodge any formal protest against it. The Defendants became the purchasers, and obtained, in the first instance, a provisional certificate of registry from the British consul at *Havre;* and afterwards, at *Liverpool*, registered themselves, on the 15th of July, 1857, as owners.

When the vessel arrived in this country, *Castrique* formally demanded possession of it, and then brought an action in the Court of Common Pleas to recover it, on the ground that the sale in *France* was illegal and void as against his earlier title.

On the argument of the special case, the Judges of Common Pleas (Justices *Williams, Willes, Byles,* and *Keating*), were of opinion that *Castrique* was entitled to recover (1). The Court of Exchequer Chamber, Lord Chief Justice *Cockburn*, Justices *Wightman, Blackburn,* and *Hill*, and Barons *Martin, Bramwell*, and *Channell*, reversed that judgment (2). The case was then brought up to this House on Error.

The Judges were summoned, and Mr. Baron *Bramwell*, Mr. Justice *Blackburn*, Mr. Justice *Keating*, Mr. Justice *Mellor*, Mr. Baron *Cleasby*, and Mr. Justice *Brett*, attended.

Mr. *Matthews*, Q.C., for the Plaintiff in Error:—

The English law alone governs the transaction, and the French Courts were not justified in applying the French law, in disregard

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cation: *Abbott* on Shipping, 9th Ed. p. 130. The master could not hypothecate the ship and also pledge the personal credit of the owners: *Steinbach* v. *Fenning* (11 C. B. p. 88). Here there was no bottomry bond, and the creditors had no claim except as general creditors of the bankrupt. The bankrupt's assignees were here postponed (8 & 9 Vict. c. 89, s. 46), to the mortgagee of the ship. According to the law of *England* the French creditors could only come in *pro ratâ* with the general creditors of the bankrupt, and had no specific right to compel a sale of the ship, the property in which, on the bankruptcy, vested in the bankrupt's assignees subject to the mortgage.

(1) 8 C. B. (N.S.) 1.

(2) Ibid. 405.

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of the English law, to its decision. The bill was a bill drawn by a British subject on a British subject, in a British colony, in respect of supplies furnished to a British ship, and the French law had nothing to do with the ship. Its jurisdiction was confined to the parties on the bill, and to their rights as arising on that instrument. That makes the case of *Cammell* v. *Sewell* (1) inapplicable. The English law is well settled. It is summed up in the case of *The Neptune, Hodges* v. *Sims* (2), where it was held that, a ship having been sold under an order of the Court of Admiralty for the payment of seamen's wages, a mortgagee and not a material man could claim the surplus of the proceeds of the sale. Necessaries furnished to a ship do not, by English law, create a lien on the ship itself. The French law may be the other way, *Code de Commerce* (3); but French law cannot govern a purely English transaction.

The lien here was perfect in the mortgagee by the delivery to him of the bill of sale. That the vessel was then at sea made no difference: *Story* on Agency (4), where both English and American authorities are quoted in support of the proposition. The French Court, however, expressly disregarded English law (5), and founded its decision on what the Judges there deemed fit to be the rule of commercial law.

The proceeding in the French Court was not a proceeding *in rem;* it was *in personam;* in truth, it was a proceeding on the bill, and was founded entirely on the right which the indorsee of the bill possessed in virtue of being its holder, that right being merely the right of proceeding against the drawer of the bill. According to the law of *France* the drawer of the bill is allowed, as he was in this case, to excuse himself from his personal liability, and to cast it on some one else; for, according to that law, judgment on any commercial debt above the value of 200 francs may be obtained by a domiciled Frenchman against all non-domiciled foreigners whose names appear on the bill. The debt then becomes *privilégié,* or special: *Code Civil* (6). But even one of the privileged

(1) 5 H. & N. 725; see observations of Lord Chief Justice *Cockburn*, 8 C. B. (N. S.)

(2) 3 Knapp, P. C. 94.

(3) Art. 191-192.

(4) Chap. xiv. s. 361.

(5) See *ante*, pp. 416, n., 417, n.

(6) Arts 2092, *et seq.*, *Code de Commerce*, 190, *et seq.*

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creditors has no more right to claim to sell the ship than has any other creditor: *Pardessus* (1). In truth, the form of phrase means no more than this: that if the ship is sold, the person who supplied the necessaries shall be treated as having a priority over other creditors against the ship. In the case of *Harmer* v. *Bell*, or the *Bold Buccleugh* (2), the nature of the distinction between a proceeding *in personam* and a proceeding *in rem* was fully considered, and in then delivering the judgment of the whole Court Lord Chief Justice *Jervis* said, expressly, that a proceeding *in rem* was a proceeding against the ship in the first instance. Now here the proceeding was, in the first instance, against the master on the bill—a proceeding strictly *in personam*—and the only title of the Plaintiff in the French Court was against the master, and was founded on the bill of exchange—a purely personal charge made by the master on his owner: the ship itself was merely introduced afterwards as affording the means by which execution for the debt on the bill might be obtained in case the master's personal liability proved insufficient. The advantage given to him was to free him from personal restraint in respect of the bill (3). That would not of itself make the ship liable to be sold, and, on the other hand, the Court might only intend to sell such rights as *Benson* possessed in priority to others in his character of captain of the ship, the advantage of privilege being given to the captain by the *Code de Commerce*, sect. 191, sub-sect. 6. But there was no judgment *in rem*, and the decision may now be disputed in this country by persons not parties to that litigation. *Simpson* v. *Fogo* (4) is a decisive authority on this case. There an English ship, already mortgaged in this country, sailed to *New Orleans*, where it was attached by creditors for the purpose of making it available for their claims. The mortgagees intervened in the suit, but the *New Orleans* Court would not recognise the mortgage of a chattel, and ordered the ship to be sold for the benefit of the creditors. The vendee brought the ship to this country, where the mortgagee filed a bill to enforce his claim, and he obtained a decree because his title was, by the law of *England*,

(1) *Droit Commercial*, pt. iv., tit. i., c. iii. s. 2.

(2) 7 Moo. P. C. 267.

(3) See the form of the judgment, *ante*, p. 416, n.

(4) 1 J. & H. 18; 1 H. & M. 195; 29 L. J. (Ch.) 657.

paramount, and the Court of *New Orleans* having disregarded the *lex loci contractus*, its decision was held not binding on the English Court. The proceedings in the French Court, therefore, could not bind *Castrique*. He was not even cited as a party, and knew nothing of the suit or the judgment. That alone renders the judgment void so far as he is concerned: *Buchanan* v. *Rucker* (1), which laid down the rule that no action could be maintained here on a foreign judgment against a man who had not been cited as a party to the proceeding. This is even a stronger case; for the French law itself requires the owner to be cited. Yet that was not done, though *Castrique* was at that moment the lawful owner of the ship. The law of the particular tribunal, as well as the law of *England*, was therefore itself disregarded; and the proceeding being taken in the absence of the owner, and without any attempt to cite him, it was contrary to natural justice, and cannot be enforced. And so with the law of nations. Where that is the case, all the authorities shew that English tribunals will not enforce such a judgment. There is no necessity to overrule the decision of the foreign Court; the English Courts simply refuse to give effect to it. *Pollard* v. *Bell* (2), and *Bird* v. *Appleton* (3), decided that a warrant of neutrality in a policy of insurance is not falsified by the sentence of a foreign Court of Admiralty condemning the ship for having been navigated contrary to the ordinances of that belligerent state, to which the neutral country had not assented. So, in *Novelli* v. *Rossi* (4), where there had been a proceeding in the French Courts on a bill of exchange, a proceeding purely *in personam*, it was alleged that the bill had been cancelled by mistake, and the French Court held that as it had been cancelled the acceptor was discharged from liability, for it was equivalent to a delay granted to him by the holder; but it was held here that the French Court had mistaken and misapplied the law of *England*, and so judgment was given here for the holder. So in *Hobbs* v. *Henning* (5), where a ship had been seized and condemned, the lawfulness of that seizure and condemnation was examined into here, and the assured held entitled to recover because the finding of the foreign

(1) 1 Camp. 63; 9 East, 192.
(2) 8 T. R. 434.
(3) 8 T. R. 562.
(4) 2 B. & Ad. 757.
(5) 34 L. J. (C.P.) 117.

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Court was erroneous. The judgment there minutely examined all the authorities which had been cited for the purpose of shewing that a condemnation in a foreign prize Court was binding on all the world. The bill of sale here completely passed to *Castrique* the title to the vessel wherever the vessel happened to be when that bill of sale was executed. The title by registration related back to the time of sale, and though the registration under the bill of sale itself to *Castrique* did not take place at the moment, so that the provisions of the 8 & 9 Vict. c. 89 were not exactly obeyed, still the title itself was complete. But, beyond this, the 17 & 18 Vict. c. 104, had come into operation before the arrival of the ship, and that statute dispensed with the necessity of registration as a something absolutely required to constitute a good title.

Mr. *Mellish*, Q.C., and Mr. *Crompton Hutton*, for the Defendants in Error :—

There are two grounds on which the title of the Defendants in Error must be treated as complete. In the first place, assuming that, as a general proposition, the French Court ought to have decided according to the law of *England*, and did mistake that law, still that would not affect this particular judgment, which was a judgment *in rem*, and, being obtained without fraud, is binding on all the world. Such a judgment cannot be affected in our Courts on the ground that the foreign Court has mistaken the law of *England*. In the second place, the proceedings in the French Court having been regularly registered and acted on there, the property in the ship passed in *France* according to their decision. If the property regularly passed there, it cannot afterwards be questioned here. The case of *Cammell* v. *Sewell* (1), therefore, is an authority in favour of the Defendants in Error, for that decided that where the property passed in the foreign Court that was sufficient, though it might not have been the same here. The Court of Exchequer Chamber there distinctly held that if personal chattels are sold in a manner binding by the law of the country in which they are sold, the sale is binding here. That decision is one which is in strict accordance with sound principle, and the commerce of the world would be seriously incommoded by a different doctrine.

(1) 5 H. & N. 728.

The mere bill of sale of the ship was not sufficient absolutely to vest the property in *Castrique*, and the French Court was justified in declining to notice his unregistered claim of ownership: *Westerdell* v. *Dale* (1).

As to the first point, the judgment in the Civil Tribunal at *Havre* was clearly a proceeding *in rem*, and being so, the sentence is conclusive: *Hughes* v. *Cornelius* (2).

It is clear that by the French law the supply of necessaries to a ship creates a lien on the ship, and that lien attaches itself to the ship wherever the ship is found. In this respect the law of *England* is an exception to the maritime law of *Europe*: *Abbott* on Shipping (3), where the subject is fully discussed.

This was a proceeding *in rem* according to the rules of all the Courts which take their proceedings from the Civil Law. The captain, as such, is, under those rules, held to be authorized to bind the owners, and to affect the ship in respect of supplies necessary for the continuation of the voyage. A judgment in an action on a bill given for such supplies, therefore affects the ship directly, and authorizes the Court to order the sale of the vessel in order to satisfy the demand.

Under these circumstances, it was a mistake in the Court of Common Pleas to examine into the regularity of the form of proceeding in the French Court. The first judgment in the Tribunal of Commerce explained fully how the ship had become liable to pay the debt contracted for supplies, and secured by the bill given by the captain in his character and capacity of master. The action was brought against *Benson*, not because he alone was personally liable, but because he, as the master of the ship, was the drawer of the bill, and so had power to bind the ship; and it could not be brought against *Claus*, because he had not accepted the bill, and was not in form liable upon it; but other persons were summoned because they had indorsed the bill and were interested in the ship on account of the supplies for which it had been given. The Court looked at the transaction, and having ascertained that the bill was given for supplies to the ship, such supplies being necessary for the continuance of the voyage, and constituting a lien on the ship

(1) 7 T. R. 306.
(2) 2 Show. 232.
(3) Pt. ii., c. iii., s. 9; 11th Ed. by Shee, 116. See also Pt. i. c. i. ss. 5 and 6.

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itself, determined, according to the law of *France*, that the bill given in respect of those supplies must be enforced against the ship itself. In every respect, therefore, this was a proceeding *in rem*, and, being so, the ship was lawfully seized and sold. This case does not come within that of *Simpson* v. *Fogo* (1), for here the Court did not refuse to act on the law of *England*, but, believing that the law of *England* did not recognise a title to the vessel not registered according to the Act of Parliament, founded its judgment on that belief. Now, it is true that the law of *England* allows the mortgage of a ship to be made while the ship is on its voyage, but it required the mortgagee to register the change of ownership. *Castrique* was not at that moment the registered owner, and the decision of the Court was right with regard to the section of the 8 & 9 Vict. c. 89, s. 37. The Court was not informed of the later statute, or if informed was not to be expected to understand, without evidence, which was never laid before it, that the plain words of the 37th section of the earlier statute were repealed by the effect of the 4th section of the later statute, and the schedule annexed to it. The adjudication was that the ship should be sold; that, surely, is a proceeding *in rem*. [THE LORD CHANCELLOR:—Could our Courts deal with a foreign ship *in rem*, after being informed that there was, by the law of the country to which it belonged, a lien upon it?] They could: *Abbott* on Shipping (2). Our Courts claim such a jurisdiction: 3 & 4 Vict. c. 65 (3). The principle that a foreign Court of competent jurisdiction might conclusively bind by its sentence the property in an English ship, was distinctly laid down in *Hughes* v. *Cornelius* (4); and that case is all the stronger, because there the vessel, which in reality was English, had been in a French Court considered good prize as a Dutch vessel, *Holland* and *France* being then at war with each other, though each was in amity with *England*. *Cammell* v. *Sewell* (5), in the Exchequer Chamber, is directly in point for the same proposition. The case of *Harmer* v. *Bell* (6), was, in reality, a question on pleading, and did not determine this point; but even

(1) 29 L. J. (Ch.) 657.
(2) Pt. ii., c. iii., ss. 25, 26, 10th Ed. p. 111; 11th Ed. p. 116.
(3) Ss. 4–6; See *Place* v. *Potts*, 5 H. L. C. 383.
(4) Carth. 32; Sir T. Raym. 473; 1 Show. 143; 2 Show. 232.
(5) 5 H. & N. 728.
(6) 7 Moo. P. C. 267.

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there it was declared that a proceeding on a maritime lien was a proceeding *in rem*. Now here, by the law of *France*, the debt arising upon a supply of necessaries to the ship, did constitute a maritime lien.

There was no imputation of fraud here; but if there had been, it could not have affected *Imrie & Co.*, who were purchasers for a valuable consideration at a public sale, made under an adjudication of a competent Court in a proceeding *in rem*.

Mr. *Matthews*, Q.C., replied.

The following question was put to the Judges:—

Whether, under the circumstances stated in the special case, the Plaintiff is entitled to recover from the Defendants the ship in question and her appurtenances?

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MR. JUSTICE BLACKBURN:—

My Lords, I have the honour to deliver the joint opinion of my Brothers *Bramwell, Mellor, Brett, Cleasby*, and myself. We answer your Lordships' question by saying, that in our opinion the Plaintiff was not entitled to recover from the Defendants.

Our reasons for this opinion are as follows:—

It appears by the case that the Plaintiff held a mortgage on the British ship *Ann Martin*, registered at *Liverpool*. This mortgage was originally made by *Claus*, the then owner of the ship, on the 30th of November, 1854, to *Harrison*. It was registered by *Harrison* at *Liverpool* on the 2nd of December, 1854, and was by him transferred to *Emley* on the 2nd of February, 1855, and this transfer was registered at *Liverpool* on the 3rd of February, 1855; and the mortgage was transferred by *Emley* to the Plaintiff on the 9th of April, 1855; but this last transfer was registered at *Liverpool* on the 13th of April, 1857, and not before. The certificate of registry never was produced to the controller or collector of *Liverpool*, and no indorsement of these various transfers was ever entered upon it.

The first question which arises is, whether on these facts the Plaintiff had any title in the ship. It was not contested at the Bar, and we think it quite clear, that the law which governed the title to British ships during the period of those transactions up to

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the 1st of May, 1855, was the 8 & 9 Vict. c. 89; and it is also clear that, on the true construction of the 37th section of that Act, no title in the ship was conveyed by any one of those transfers till registered at *Liverpool*, but that, when so registered, the title was complete, and that the indorsement, on the certificate, of the transfer is not essential to the title. Consequently, on the last day of April, 1855, the ship (as far as the mortgage extended) was the property of *Emley*, and any action for a conversion of the ship prior to the 1st of May, 1855, must have been brought in the name of *Emley*, though as the law then stood the present Plaintiff might at any time, by registering his transfer from *Emley*, perfect his title as transferee of the mortgage. But by 17 & 18 Vict. c. 120, the 8 & 9 Vict. c. 89, is repealed as from the 1st of May, 1855, and the transfer to the now Plaintiff *Castrique* was not registered till the 13th of April, 1857.

It is necessary to decide in this case whether *Castrique* can maintain an action of trover for a conversion subsequent to the register of his title after the 13th of April, 1857, and we agree in what is tacitly decided by both Courts below, that he might do so. The Legislature could not intend, by the repeal of the 8 & 9 Vict. c. 89, to deprive persons in the situation of the Plaintiff of the right they had already acquired.

In the interval between the repeal of the Act 8 & 9 Vict. c. 89, viz., the 1st of May, 1855, and the actual registration of that transfer, viz., the 13th of April, 1857, there is a question whether any action depending on the right to the possession of the ship ought to have been brought by *Emley* or by *Castrique*. This question might have come before the French Courts in the course of the proceedings before them, to determine as a question of English law. It is not necessary for us in the present action to determine it, or to express any farther opinion than that it was one on which good English lawyers might differ.

So far the case depends only on English law, and we think it clear that the Plaintiff was entitled in this state of facts to recover in an action of trover for the conversion on the 20th of August, 1857, unless the effect of the proceedings in *France*, and the sale of the ship under them on the 29th of May, 1857, was to confer on the Defendant a title superior to that of the Plaintiff.

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What were the nature and effect of the proceedings in *France*—what jurisdiction the Courts there had? and what the effect of their determinations really was? are all questions depending on the French law, and it must be ascertained as a fact what that French law is. When once that fact is ascertained, it becomes a question of English law to determine what effect is to be given to it in an English Court.

In the present case the parties at the trial agreed upon a statement of the facts, and gave the Court authority to draw inferences from them; but, unfortunately, they have stated the facts as to the French law very imperfectly, and the result has been that the Court of Common Pleas has drawn one inference as to the French law, and the Court of Exchequer Chamber has drawn another. It is very possible that a French lawyer may justly say that neither is right; it is quite certain that both cannot be. It is now for your Lordships to determine what the proper inference is, and on that point we must express our opinion. It is quite possible that the inference we draw may not be the correct one, but we apprehend that all that can be required of a tribunal adjudicating on a question of foreign law is to receive and consider all the evidence as to it which is available, and *bonâ fide* to determine on that, as well as it can, what the foreign law is (1). If from the imperfect evidence produced before it, or its misapprehension of the effect of that evidence, a mistake is made, it is much to be lamented, but the tribunal is free from blame.

We think that some points are clear. When a tribunal, no matter whether in *England* or a foreign country, has to determine between two parties, and between them only, the decision of that tribunal, though in general binding between the parties and privies, does not affect the rights of third parties, and if in execution of the judgment of such a tribunal process issues against the property of one of the litigants, and some particular thing is sold as being his property, there is nothing to prevent any third person setting up his claim to that thing, for the tribunal neither had jurisdiction to determine, nor did determine, anything more than that the litigant's property should be sold, and did not do

(1) See the rule as to this matter expressly declared in *Di Sora* v. *Phillips*, 10 H. L. C. 624.

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more than sell the litigant's interest, if any, in the thing. All proceedings in the Courts of Common Law in *England* are of this nature, and it is every day's experience that where the sheriff, under a *fieri facias* against *A.*, has sold a particular chattel, *B.* may set up his claim to that chattel either against the sheriff or the purchaser from the sheriff. And if this may be done in the Courts of the country in which the judgment was pronounced, it follows of course that it may be done in a foreign country. But when the tribunal has jurisdiction to determine not merely on the rights of the parties, but also on the disposition of the thing, and does in the exercise of that jurisdiction direct that the thing, and not merely the interest of any particular party in it, be sold or transferred, the case is very different.

It is not essential that there should be an actual adjudication on the status of the thing. Our Courts of Admiralty, when property is attached and in their hands, on a proper case being shewn that it is perishable, order (1) that it shall be sold and the proceeds paid into Court to abide the event of the litigation. It is almost essential to justice that such a power should exist in every case where property, at all events perishable property, is detained.

In a recent case of *Stringer* v. *English and Scottish Marine Insurance Company*, in the Queen's Bench (2), it appeared that the American Prize Court, *pendente lite*, ordered a valuable cargo, which was claimed as prize, to be sold, and that not only without any adjudication that it was a prize, but although the decision of the Court below had been against the captors, and that decision was ultimately affirmed on appeal. We apprehend that it is clear that in all such cases Courts sitting under the same authority must recognise the title of the purchaser as valid. In *Story* on the Conflict of Laws (3), it is said that the principle that the judgment is conclusive "is applied to all proceedings *in rem* as to moveable property within the jurisdiction of the Court pronouncing the judgment. Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any other

(1) For the benefit of all parties concerned. (2) Law Rep. 4 Q. B. 676.
(3) Sect. 592.

foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign Courts of Admiralty, whether they be causes of prize or bottomry, or salvage or forfeiture, of which such Courts have a rightful jurisdiction founded in the actual or constructive possession of the subject matter."

We may observe that the words as to an action being *in rem* or *in personam*, and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the last few words quoted from *Story*. We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the state under the authority of which the Court sits; and, secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world.

In the case of *Cammell* v. *Sewell* (1) a more general principle was laid down, viz., that "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere." This, we think, as a general rule, is correct, though no doubt it may be open to exceptions and qualifications; and it may very well be said that the rule commonly expressed by English lawyers, that a judgment *in rem* is binding everywhere, is in truth but a branch of that more general principle. But we think that it is unnecessary in this case to resort to the more general principle, or to inquire what qualifications, if any, ought to be attached to it as a general rule. The ship *Ann Martin* was in *France*, and if the transfer of the ship in consequence of the decree of the French Court was in *France* good against all the world, it could only be so on the ground that the judgment of the French Court was, according to the French law, a judgment *in rem* transferring the ship itself, and not merely the interest, if any, of *Claus* in the ship.

The first question, therefore, as it seems to us, which must be determined, is one of fact, namely, what was the nature of the

(1) 5 H. & N. 746.

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proceeding before the *Tribunal de Commerce* at *Havre*, and what was the meaning and effect of the judgment on the 15th of May, 1855, pronounced against *Benson* as master of the *Ann Martin*, "*et par privilége sur ce navire*" for the amount of the bills drawn by *Benson* for necessaries supplied to that ship at *Melbourne*. It was under that judgment that the ship was arrested and ultimately sold; and as we must (at least till the contrary is clearly proved) give credit to a foreign tribunal for knowing its own law, and acting within the jurisdiction conferred on it by that law, it must, we think, be taken that the French law gave that Tribunal of Commerce jurisdiction to cause the ship to be arrested, and, through the intervention of the Civil Tribunal, to be sold; though it remains a question whether it was by a proceeding analogous to that of our own Admiralty Courts (in which the ship itself and the interests of all persons in it are disposed of), or by a proceeding analogous to that under a *fieri facias* in furtherance of the judgment of one of our Courts of Common Law (in which only the interest, if any, of the litigant party is disposed of).

On this point the case is stated in a very unsatisfactory manner; but we must form the best opinion we can from the very meagre materials laid before us. Your Lordships, sitting here as the ultimate Court of Appeal, take judicial notice of all English laws, including the general maritime law as it is administered in *England* by the Courts of Admiralty; but you do not know the municipal laws of foreign countries, except in so far as evidence to prove them is brought before you.

Mr. *Matthews*, in the course of his argument, wished to refer to various parts of the *Code Civil* and the *Code de Commerce*, and to ask your Lordships to construe them for yourselves. But this would have required your Lordships to take notice of facts (for foreign laws are facts) not proved in the cause; and there is great and obvious danger that any attempt to construe the written code of a foreign law without the aid of foreign lawyers to explain it might lead to error.

The Civil Tribunal of *Havre*, in the collateral suit to procure a *main levée*, so attempted to construe our Ships Registry Acts, and very naturally made a mistake. If the French law required the French tribunal to construe the English Acts for themselves, this

was a misfortune for which the French tribunal is not to blame; but it affords an example of the danger of such a mode of proceeding. We know, however, that both in our own country and in every other, persons who supply necessaries to a ship in a foreign port may, under some circumstances, acquire a right over the ship. In *England* such a right was required to be by a written contract or hypothecation, which, says Lord *Tenterden*, in his last edition of *Abbott* on Shipping (1), "does not transfer the property in the ship, but only gives the creditor a privilege or claim upon it to be carried into effect by legal process." The mode in *England* of carrying this privilege into effect has been instituting a suit in the Court of Admiralty against the ship, causing it to be arrested by warrant, and ultimately, if no one successfully intervenes to prevent it, selling the ship.

As in *England* the Court of Admiralty was liable to a prohibition if it attempted to institute a suit against the owners: *Johnson* v. *Shippen* (2); there never could be any doubt in *England* that such proceedings were against the ship. The contention of the Defendant in the present case is that the proceeding "*par privilége sur ce navire*" was a proceeding analogous to the seizure of a ship by the warrant of the English Admiralty as the beginning of a suit against the ship. The case before us states that the proceeding was commenced and prosecuted by *Trotteux* against the said *William Benson* "and against the ship." If this is meant to be a statement of the fact on which the parties, having before them the evidence of French lawyers on both sides, agreed, it seems to conclude the question. It was, however, argued for the Appellants that this was merely a phrase which had slipped in by accident, and that the words "*par privilége sur ce navire*" were not to be understood as meaning that the holders of the bills drawn in favour of those who supplied the necessaries to that ship had made a *primâ facie* case sufficient to entitle them to arrest that ship and try by legal process to carry their claim into effect against the ship (which is the sense in which Lord *Tenterden* uses the word "privilege"); but that it really meant that having obtained a judgment against the master, they had in effect obtained a judgment against his owners personally, and, therefore, were

(1) 5th Ed. p. 122, pt. 2, ch. 3, art. 23. (2) 2 Ld. Raym. 983.

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entitled to seize their debtor's ship and sell his interest, if any, in it, but no more; and that the meaning of "privilege" was no more than a preferential right to be paid out of the proceeds of the execution before an ordinary creditor, analogous to the right of a landlord in *England* to receive a year's rent from the sheriff.

We, however, do not think this latter interpretation consistent with the course of the proceedings as disclosed in the French Courts in the case. If the Tribunal of Commerce was merely awarding execution against the ship as far as it was a debtor's property, it was irrelevant and premature to say whether that debt would have priority of payment or not. If it was doing what was equivalent to the process of our own Court of Admiralty in issuing a warrant to seize the ship in order to institute a suit against it, there was very good reason for setting forth as the ground of this proceeding that the debt was such as to give rise to at least a plausible ground for a claim against the ship to be carried into effect by legal process, which is Lord *Tenterden's* understanding of the word "privilege." And the subsequent proceedings in the Civil Tribunal, though imperfectly stated in the case, seem to be very like the proceedings in the Court of Admiralty after the ship is libelled. All those who had any claim on the ship, of which, either by the ship's papers or *otherwise*, either *Trotteux* or the Civil Tribunal had notice, were summoned to appear, and they having made default, a judgment was pronounced, not, as it appears to us, against them personally, but that the seizure of the ship should be confirmed, and that it should be sold; and notice of this judgment was served on *Claus'* assignee in bankruptcy, who had thereby another opportunity given him to oppose the sale of the ship.

We can, therefore, come to no other conclusion of fact, than that this proceeding has been correctly stated to be a proceeding against the ship, therein agreeing with the judgment of the Exchequer Chamber, and differing from that of the Court of Common Pleas.

But it was argued that this judgment of the French Court was to be disregarded because it was founded on a misapprehension of the English law. It appears that, though *Castrique* had no formal notice of the proceedings, he became aware of them before the judgment was executed by the sale of the ship; and on the 22nd

of September, 1855, relying upon his title as mortgagee according to English law, commenced a suit to release the ship from detention; and the Civil Tribunal, under a misapprehension of the English law, decided that the mortgage could not be available until it was registered on the ship's certificate, and, consequently, that *Castrique* had no *locus standi* (*Qu'ils n'ont pas dehors qualité pour critiquer la poursuite de Trotteux*).

We may, without arrogance, say that on this question of English law the French Courts were wrong, and the error was a material one, for if the French Courts had rightly understood the English law they would have known that *Emley* at least had a perfect title to the ship, and that, if that title was not transferred to *Castrique* so as to enable *Castrique* to sue or intervene in his own name, he could have used that of *Emley*, so that in one way or the other there was a *locus standi*. And the ultimate judgment of the Court of *Rouen*, after this action was tried, which is set forth in a note to the report of this case in the Common Bench Reports (1), shews us that if *Castrique* had been permitted to oppose the sale, he would have succeeded, for he would have satisfied the French Court that, according to the maritime law, as administered in *France*, the law of the flag (in this case that of *England*) alone ought to govern the question, though the ship was locally within the Empire of *France*. And that judgment, with perfect accuracy, states that, not being holders of any instrument of hypothecation, the holders of the bills [of sale] "*ne peuvent réclamer aucun privilége d'après la loi Anglaise*," and that "*cette loi . . . exige certaines formalités qui n'ont pas été remplies, pour que les avances faites au capitaine en cours de son voyage soient privilégiées.*" But we cannot agree that this error renders the French judgment void altogether in a foreign country. Fraud will indeed vitiate everything; though we may observe that there is much force in what Mr. *Mellish* suggested in the course of his argument in this case, that even if there had been fraud on the part of the litigants, or even of the Tribunal, it would be very questionable whether it could be set up against a *bonâ fide* purchaser who was quite ignorant of it. But fraud in the present case is out of the question, and we cannot think that a mistake on the part of the Court as to a foreign law is equivalent

(1) 8 C. B. (N. S.) 38; but see *ante*, pp. 417, 418.

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to fraud. It would be peculiarly ungracious to assert this doctrine in a case where the English Courts below have differed on the question what the French law is. We think, as already stated, that all that can be required of the tribunal that has to decide on a question of foreign law is that it should receive and consider all the evidence as to what the foreign law is, and *bonâ fide* determine on that as well as it can.

Various cases were cited as authorities that where a foreign Court has mistaken or misapplied the English law, the Courts of this country will not regard the foreign judgment; but we think they do not bear out any such general position. One class of cases—such as *Pollard* v. *Bell* (1); *Bird* v. *Appleton* (2); *Dalgleish* v. *Hodgson* (3), and several others—proceed on a principle not applicable to the present case. A judgment in an English Court is not conclusive as to anything but the point decided, and therefore a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged. But very early in insurance cases a practice began of treating the judgment of a Prize Court condemning a vessel as being the property of an enemy as not only conclusive evidence that the vessel was condemned, which of course it was, but also as conclusive evidence that the vessel was not neutral.

There are many cases which proceed on the principle that where it can be made to appear that the judgment of the Prize Court did not proceed on the ground that the vessel was an enemy's property, it cannot be conclusive evidence that it was not neutral. In *Lothian* v. *Henderson* (4) the judgment of the House of Lords was, that in a policy on a ship, warranted neutral, a stipulation that a condemnation should not be conclusive evidence that the vessel was not neutral was effectual. Lord *Eldon*, in delivering that judgment, expresses (5) a strong opinion that the practice of receiving the sentences of Prize Courts as conclusive of the collateral matter

(1) 8 T. R. 434.
(2) Ibid. 562.
(3) 7 Bing. 495.
(4) 3 B. & P. 499.
(5) 3 B. & P. 545.

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was originally a mistake, but had become inveterate, and could not now be disturbed. And he also intimates an opinion that the cases just alluded to were attempts to graft a vicious exception on a rule originally vicious, but now become law. It is unnecessary to form or express any opinion on these cases, farther than that they proceed on a principle that has no bearing on the present question.

Novelli v. *Rossi* (1), which was relied on, also proceeds on a principle not at all applicable to the present case. It is clear that no judgment of a foreign Court can have any effect unless the subject-matter of the decision (whether *inter partes* or *in rem*) is within the lawful control of the state whose tribunal has pronounced the judgment. In *Novelli* v. *Rossi*, a Frenchman had, at *Lyons*, drawn a bill on an Englishman in *London*. The Defendant had, at *Manchester*, indorsed it to the Plaintiff. Afterwards, the Defendant instituted a suit in *France* to have it declared that he and all prior parties were discharged from their obligations on the bill on account of a cancellation of the acceptance in *London* by mistake; and, notwithstanding the opposition of the Plaintiff, the French Court, on a mistaken view of the English law, pronounced a judgment to that effect. But though the French tribunals had jurisdiction to determine that no one should sue on the bill in their Courts, they had none to determine that the Plaintiff should not sue in an English Court on an English contract. If they had taken a correct view of the English law there would have been a defence, because such was the English law, not because the French Court had so decided. Being wrong, there was no defence, not because the French Court made a mistake, but because it had no jurisdiction.

The same principle will, we believe, be found to lie at the bottom of those cases in which our Courts have refused to enforce judgments obtained in a foreign country against a person not resident in that country, and who had no notice of the suit, such as *Buchanan* v. *Rucker* (2). It may very well be held that the foreign country has no jurisdiction to pronounce judgment against a person behind his back who is not subject to its jurisdiction; but it is unnecessary to examine these cases, for in the present one the ship *Ann Martin* was clearly within the jurisdiction of the Empire

(1) 2 B. & Ad. 757. (2) 9 East, 192.

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of *France;* and the Plaintiff had notice, and was heard, though unluckily the French Court made a mistake.

Simpson v. *Fogo* (1) was also cited, but that case proceeded on a principle very different from any applicable to the present case. There a creditor of Messrs. *Kilgender*, the owners of a British ship, obtained in *Louisiana* a judgment against them, under which their interest in the ship, and no more, was sold under a process exactly analogous to our *fieri facias*. There could be no doubt, if that had been all, that the Bank of *Liverpool*, which held a valid mortgage on the ship, might have taken possession of it as against the purchasers just as much as against the judgment debtors, *Kilgender & Company*. But the bankers in *Liverpool* had in *Louisiana* intervened and endeavoured to prevent the sale of their ship, and a judgment was pronounced against them, on the ground that the Courts in *Louisiana* wholly disregarded all rights acquired in *England* on an English ship, unless they were acquired in such a manner as to be valid in *Louisiana*. The contention before the Vice-Chancellor was that the purchaser of the ship and the bankers in *Liverpool* were privies to this judgment, and that, therefore, the purchaser was entitled to use it as an estoppel to preclude the bankers from setting up in an English Court their English right, though the judgment proceeded on the ground that the English right was to be wholly disregarded. The Vice-Chancellor decided otherwise. We should be sorry to cast any doubt on a decision which *primâ facie* seems to carry out justice and good sense; but all that it is necessary to say in the present case, and therefore all that we do say, is that no such point here arises. The judgment of the French Court decreeing the sale of the vessel was not, according to the view of the facts which we take, a judgment that only the interest of *Claus*, if any, in the ship should be sold, but that the particular ship itself should be sold. And, finding no authority for saying that the purchaser, under the decree of a foreign Court having competent jurisdiction to decree the transfer, is to be responsible for any mistakes made by that Court either in law or fact, we think we ought to act on the reason given in *Hughes* v. *Cornelius* (2): "We must not set them at large again, for other-

(1) 29 L. J. (Ch.) 657; 32 L. J. (Ch.) 249; 1 Jo. & H. 18; 1 H. & M. 195.
(2) 2 Sm. L. C. 604; 2 Show. 232.

(1) SC 6 Jur NS 949; 9 Jur NS 403.

wise the merchants would be in a pleasant condition." In truth, the Plaintiff asks an English Court to sit as a Court of Appeal from the French Court, which is not the province of an English Court; and even if the English Court had had jurisdiction as a Court of Appeal to reverse the judgment of the French Court, we are of opinion that the sale ordered and made whilst that judgment was unreversed would not be avoided.

MR. JUSTICE KEATING :—

My Lords,—I also am of opinion, in answer to the question put by your Lordships to the Judges, that the Plaintiff is not entitled to recover against the Defendants; but as the grounds upon which I come to that conclusion do not entirely coincide with those of others of my learned brethren, I deem it right to state the reasons upon which my opinion is founded.

I think the judgment of the French Court under which the ship *Ann Martin* was sold was not a judgment *in rem*, but a judgment *in personam*, upon proceedings instituted originally against the master personally, the seizure of the ship being only collateral in order to secure the debt; and I am farther of opinion that such judgment was erroneous upon the face of it. I do not, however, at present propose to trouble your Lordships with the reasons at length which have led me to that conclusion, but rather crave leave to refer to the judgment pronounced by the Court of Common Pleas in the present case (1).

Since, however, that judgment was delivered, the case of *Cammell* v. *Sewell* has been decided by the Exchequer Chamber (2). That was a case in which a cargo of deals consigned to an English firm was shipped in a Russian port on board a Prussian vessel, which on its way to *England* was cast away upon the coast of *Norway*, but the cargo was safely landed. Steps were taken by the captain, without authority or the existence of any necessity, to sell the cargo, and for that purpose certain judicial proceedings took place, under which an auction was decreed, and the deals sold to a purchaser, under whom the Defendant claimed, notwithstanding the protest of the agent of the Plaintiffs, who were English underwriters, and who had become owners of the deals

(1) 8 C. B. (N. S.) 35. (2) 5 H. & N. 728.

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by having accepted an abandonment and paid as upon a total loss. The Plaintiffs thereupon instituted a suit in the Superior Diocesan Court in *Norway*, praying that the public auction should be disallowed and the purchaser compelled to deliver up the goods *in specie*. That Court, however, affirmed the previous proceedings, and directed that the auction should be confirmed. The goods were afterwards consigned by the purchaser to the Defendants in *England*, who refused to deliver them to the Plaintiffs.

The Judges of the Court of Exchequer, when the case was before them (1), considered the judgment of the Diocesan Court in *Norway* to be in the nature of a judgment *in rem*, and that the Plaintiffs were concluded by it as such, but seemed to think that even if not a judgment *in rem*, it yet would bind the Plaintiffs as being the judgment of a Court of competent jurisdiction to which the Plaintiffs had themselves resorted, and accordingly gave judgment for the Defendant. Upon appeal, all the Judges in the Exchequer Chamber were of opinion (without finding it necessary directly to decide the point) that the judgment of the Diocesan Court in *Norway* was not a judgment *in rem*, but held (*Byles*, J., *dissentiente*) that inasmuch as by the law of *Norway* an innocent purchaser at the judicial sale would have a good title to the goods purchased, even though the master could not as between himself and his owners or the owners of the cargo justify such sale, the law of *Norway* would prevail; and in terms proceeded to affirm the proposition that "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere," and the judgment of the Court of Exchequer was, upon that ground only, affirmed.

Now, if that decision of the Court of Exchequer Chamber be law, it is difficult to say that the present case does not fall within the operation of the general rule there laid down, for although in the present case there is no express statement that by the French law the sale of the *Ann Martin* by judicial authority would conclusively transfer the property to an innocent purchaser, as the Defendant in this case undoubtedly was, yet I think it must be inferred, from the facts stated in this special case, that the Defendant's

(1) 3 H. & N. 640.

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title would be unimpeachable in *France*, and if so then, according to *Cammell* v. *Sewell* (1), it would be equally so in this country.

No doubt the proposition seems to be rather startling, that by the comity of nations a British ship putting into a French port in the ordinary course of navigation may be seized and sold under the judgment of a French tribunal adjudicating upon an English contract, though misconceiving or disregarding the English law, so that the property of an English shipowner may be thus sold to pay the debt of another person in pursuance of a judgment erroneous upon its face, and that without even notice being necessarily given to him of the proceedings. And it may also perhaps well be doubted whether towards other nations France will be at all disposed to reciprocate such comity; still, although such consequences may not have been foreseen in the decision of *Cammell* v. *Sewell* (1), yet I think that case does govern the present, and that although not of course binding upon your Lordships, it is so upon me.

I therefore answer your Lordships' question to the Judges,—that under the circumstances stated in the special case the Plaintiff is not entitled to recover from the Defendants the ship in question and her appurtenances.

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THE LORD CHANCELLOR (Lord *Hatherley*) stated the facts of the case, and, on mentioning the dates of the transfers to *Harrison* and *Emley*, and the registration of those transfers, said :—

Emley assigned the mortgage to the Plaintiff *Castrique* on the 9th of April, 1855, but *Castrique* did not register that mortgage until the 13th of April, 1857, two years afterwards. The proceeding of the Tribunal of Commerce at *Havre*, as I said, was in May, 1855; at that time *Emley* was the person who was the registered mortgagee, and the learned Judges who have assisted us in the consideration of this case, particularly Mr. Justice *Blackburn*, have pointed out to our attention the circumstance that there was some change with reference to the laws regulating British ships during the interval between May, 1855, and April, 1857, when the Plaintiff *Castrique* registered his mortgage; but I agree with Mr. Justice *Blackburn* in the conclusion that *Emley*, at all events, must be the person treated as being interested as the mortgagee

(1) 5 H. & N. 728.

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on the register at the time when the proceedings were had as to the ship, and *Castrique* afterwards, by registering in 1857, acquired a title which would have enabled him to take any proceedings in respect of the ship, after his so registering, notwithstanding some question might possibly arise upon the construction of the two Acts, and the result of any transactions which had commenced before the one Act had ceased its operation on the 1st of May, 1855, and after the transfer of the mortgage from *Emley* to the Plaintiff, and between that time and the 13th of April, 1857, when the Plaintiff *Castrique* registered his mortgage. I only mention that to shew that I have not overlooked this circumstance, but I do not think it has any material bearing upon the question before us.

The next thing that was done was this. In the proceeding at *Havre*, before the Tribunal of Commerce, *Benson* alone, and not *Claus*, the owner, nor the mortgagees, nor any person directly interested in the ship, had been summoned to appear as a party. I ought to have stated that in the meantime *Claus*, besides having made this mortgage to *Harrison*, had, after his mortgage to *Harrison*, become bankrupt, and an official assignee, of the name of *Bird*, had been appointed. Now, it appears that by the law of *France* there could be no farther proceeding taken with reference to the ship, in order, by the sale of the ship, to obtain any payment of the debt due to Messrs. *Trotteux*, without having the affirmation of the decision of the Tribunal of Commerce, by the Civil Tribunal of the district, which was at *Havre*. Accordingly Messrs. *Trotteux* proceeded before the Civil Tribunal at *Havre*. And there all the persons were summoned who appeared upon the ship's papers to be the owners of the ship, that is to say, *Claus*, who appeared to be the owner, was summoned, and *Bird*, as official assignee, of whom notice had been obtained by the Tribunal, was also summoned. There was no notice, of course, upon the ship's papers in respect of those mortgages which had been made while the ship was still upon its voyage; and, therefore, nothing respecting that could appear upon the papers, and nothing was, therefore, done in reference to the summoning of the mortgagees of the vessel, who were absent.

In that state of circumstances, *Claus* and *Bird* not having

appeared before the Tribunal, the Tribunal at *Havre* proceeded to affirm the judgment which had been come to by the Tribunal of Commerce, and ordered by an order, recorded on the 16th of August, 1855, that the ship should be sold "by public auction to the highest bidder at the sittings for sales of the said Civil Tribunal, in the presence of one of the Judges of the said Civil Tribunal, duly delegated by the said judgment to receive the biddings at such sale of the said ship, and to pronounce the adjudication in respect thereof." Now, that having been done, the Plaintiff obtained notice of this sale having been directed, and of these proceedings having been taken in *France;* and, although the Plaintiff had not registered himself at this time as mortgagee in *England*, he, nevertheless, having had that assignment of mortgage, took upon himself to institute proceedings in *France*. On the 22nd of September, 1855, he instituted a proceeding "in the nature of a suit to replevy the ship," to release the ship from the custody in respect of his interest in the vessel. Proceedings were had before the Civil Tribunal, and a judgment was arrived at by that Tribunal on the 19th of April, 1856. The Judges of the Court then considered the whole case as brought before them by Messrs. *Castrique & Co.*, and they state in their judgment that the question at issue really concerned the property of a vessel sailing under the name of *Claus* as owner; and they go on to state "it is impossible to believe that under any commercial law whatsoever, it could be allowed that, in the course of a voyage, such property may be conveyed to a third party, or be mortgaged to him by way of security, without there appearing on the papers of the vessel any trace of that conveyance or modification of the property; that good faith which is the soul of commerce is contrary to such an idea." Then, having given these as their reasons, they came to the conclusion, in fact, that the claim of *Castrique* was not to be allowed, and that the sale of the vessel was to proceed.

The Plaintiff *Castrique* seems upon that to have appealed against this order to the superior Tribunal at *Rouen*, and in bringing it before that Tribunal he fortified himself with the opinion of the English Attorney-General as to the effect of his mortgage here. That opinion stated the law as it exists in this country with reference to mortgages, and stated farther that by the English law, "if

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the repairs were done or money advanced on personal credit, even if a bottomry bond be subsequently actually given, it will not hypothecate the vessel, as no repairs, &c., done on personal credit can be afterwards converted into a bottomry transaction." This opinion was brought before the Judges who heard the case at *Rouen*, and then they came to a conclusion affirming the decision of the Court below. Mr. *Castrique* was condemned to certain costs, and a certain payment in respect of damages which had accrued.

That being so, the ship was, in effect, sold in the usual manner required by the French law, with a Judge presiding, and sold by auction. Mr. *Castrique* himself appeared at the auction, and gave no notice of any claim which he then set up. Under all the circumstances of the case, I do not rely upon his so appearing at the auction as forming an ingredient in that which ought to be the foundation of our conclusion. The question which really arises before us is this, whether or not the judgment of the French Court, and the consequent sale had in pursuance of that judgment, must be treated as having changed the property of the ship. The ship was bought at that auction by a person who was a British subject, and who came here and registered himself as the owner of the vessel, and is now represented by the Defendant. The question is, as to the property of the ship as between *Castrique* and the Defendant.

We have been assisted with the opinions of the learned Judges in this case, and I entirely concur in the conclusion at which they have arrived. It appears to me, in the first place, desirable to consider whether this judgment must be taken as a judgment by the French Court *in rem*, or whether it is to be taken as a judgment purporting only to deal with the interest in the vessel, whatever that interest might be, of *Benson*, who was the debtor in the action on the bill, and as giving no farther or other right than such interest as *Benson* had. As it was stated by the learned Judges, we are familiar in our law with that distinction; we are familiar with the course taken by the Court of Admiralty in proceedings against a ship, selling a ship, and giving a title against all third persons who become purchasers under a decree of that Court; we are familiar also with the course taken by our own

Courts of Law in decreeing judgment of any property of a debtor taken by levy upon his goods, in which case the interest of the debtor in the chattel is sold, and that interest alone, and no farther or other right than that possessed by the debtor, can be transferred to persons purchasing under that sale. In other words, they purchase simply the interest of the debtor in that chattel.

If we look at the course of proceedings to see what were the intent and purpose and duty of the French Courts, and if we ask did they proceed in this course which they took in directing the sale of the vessel as against the vessel itself, we find that there has been a difference of opinion upon that point between the Court of Common Pleas and the Court of Exchequer Chamber. The Court of Common Pleas thought that it was not a proceeding against the ship itself, but simply against such interest as the debtor had therein, while the Court of Exchequer Chamber came to the conclusion that it was a proceeding against the ship itself. Now, I entirely concur in the remarks of the learned Judges who have assisted us in this case, that, unfortunately, the case being one of foreign law, which we must consider as a fact laid before us, it has not been stated in the special case, with all the clearness which would have been desirable, what that law is. But what is there stated it appears to me is sufficient to indicate upon the whole the course taken by the French Courts and the grounds of their proceeding. In the first place, it was a proceeding against *Benson* and the ship which originated the matter. That being so, I think that it would be very difficult to say that a proceeding *in rem* was not one of the matters contemplated in the original judgment. The judgment of the Tribunal of Commerce was a judgment against *Benson*. He had desired not to be made personally liable, as the expression here is, in respect of this judgment, and it was given against him "by privilege upon the ship." The ship was then directed to be sold. A good deal of argument turned upon that expression "by privilege upon the ship." The case was argued extremely ably by Mr. *Matthews* at your Lordships' Bar. He put the case to us thus: What was meant was no more than this, that when the ship should be sold the captain, by virtue of the French law, would be a privileged creditor, and would be entitled to be paid out of the first proceeds of the sale, but that it did not

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necessarily follow from this circumstance that the sale was ordered to be made as against all persons having an interest in the ship. He put it in this way, that it might be treated as if the Court had regarded the whole matter thus: that he, *Benson*, would have a certain amount of interest in the ship by virtue of such privilege as he might have, and the Court might merely mean to sell all such amount of interest as *Benson* had, and therefore to dispose only of those rights which he possessed in priority to others, and to the amount which might be due to him as captain in respect of any claim he had in that capacity upon the ship; in other words, to sell exactly what was due to *Benson* as captain, and not to sell the ship, *per se*, for any other purpose whatever.

But, as was well observed by the learned Judges, in the first place this privilege could only arise after the sale of the ship had taken place to give him a priority over other creditors interested in disposing of the vessel. But farther than that, regard being had to the original proceeding, being a proceeding against *Benson* and the ship, and *Benson* himself being excluded from any personal liability, and the judgment against him being by privilege upon the ship, it does appear to me that the word "privilege," as used here, is used much more in the sense in which it is used by Lord *Tenterden* in his work upon shipping, of a charge upon a vessel which the person is entitled to realize by sale, than in the sense of saying simply that amongst all the several persons who may have claims when the ship comes to be sold, *Benson* is to stand in a favoured position. In other words, the French Court intended by the proceeding taken to adjudge the sale of the vessel in order to satisfy this privilege.

But, beyond that, I think the case becomes somewhat clearer when it is carried to the Civil Tribunal, which was called upon to affirm the judgment of the Tribunal of Commerce, and give efficacy to the dealing with the ship. What course did the Civil Tribunal take? It summoned all who were supposed to be the owners of the ship. The Judges of that Court only knew of *Claus* and *Claus's* assignee—they did not know any of the mortgagees whose titles did not appear upon the ship's papers; at all events, they considered, if anything was said about them, that they could pay no attention to persons of whom they could have no knowledge except

through the medium of the ship's papers. For what purpose did they call *Claus* and his assignee? For the purpose of making them liable upon the bill, not because *Claus* had accepted it, but only because, being interested in the thing they were about to sell, they thought it right that *Claus* and his assignee should be present.

Therefore, upon the whole proceeding, taking first the proceeding against *Benson* and the ship, next, the detainer of the vessel by the Tribunal of Commerce for the purpose of the sale being affirmed by the Superior Court, and then the Superior Court when it arrives at the question of sale or no sale, taking care to summon those whom alone it could recognise as owners, I think there can be no doubt that the judgment of the Court was intended to be a judgment *in rem*, and therefore the Court intended to do that which by the French law it did, namely, to transfer the ownership in the vessel.

That being so, the only remaining point is this; it is said that the French Judges decided against our English law; that the effect of our law was laid before them, and that they disregarded it and determined the case contrary to what the law of this country would be. It is said that the law of the flag should have governed the decision of the French Courts with reference to this vessel, and therefore, the Courts having come to an erroneous conclusion, the judgment that they erroneously gave and so acted upon would not here confer a title upon those who in *France* undoubtedly, under that judgment, did acquire it.

Now, my Lords, without expressing any opinion (for I purposely wish to avoid doing so) with reference to a decision of my own which has been cited, in the case of *Simpson* v. *Fogo* (1), as to what might be done in the case of a Court wilfully determining that it will not, according to the usual comity, recognise the law of other nations when clearly and plainly put before it, without saying anything as to what would justify the Courts in our own country in hesitating to give effect to a foreign judgment if obtained by fraud or misrepresentation, it is enough for me to say upon the present occasion, that, in this case, the whole of the facts appear to have been inquired into by the French Courts judi-

(1) 1 Jo. & H. 18; 1 H. & M. 195.

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cially, honestly, and with the intention to arrive at the right conclusion, and having heard the facts as stated before them they came to a conclusion which justified them in *France* in deciding as they did decide. That decision confirmed the title by sale to the person who became the purchaser at the sale. According to the law of *France* that title could not be thereafter disputed or disturbed, the Court at *Rouen* being the highest Court having jurisdiction in the matter.

That being so, there being neither a case of refusal to attend or listen to anything that might be said to them with reference to our own law, nor to adopt that as the ground of their conclusion, and there being no case, as far as I know, of any fraudulent representation or concealment with reference to any facts in the case, and the decision having been come to and pronounced, not, as in one of the cases which was cited, in the absence of the parties, but in *Castrique's* own suit, where he had every opportunity of bringing forward his own case, the decision cannot be complained of as one contrary to justice through its being pronounced in the absence, from want of citation, of any of the parties interested, I therefore think we are bound to give effect to the conclusion arrived at by the French Court, and to the title derived through the medium of that conclusion, and that the Court of Exchequer Chamber was right in the decision to which it came. And therefore, I have to submit to your Lordships that the decision of the Court of Exchequer Chamber ought to be affirmed.

LORD CHELMSFORD :—

My Lords, in order to entitle the Plaintiff to recover the ship in question it was necessary for him to shew that the judgment in the French Court might be questioned, and to prove it to be one that our Courts will not recognise. It is admitted that if the judgment of the Court at *Havre* was a judgment *in rem*, the Plaintiff cannot recover in this action unless he can impeach the judgment on the ground of fraud, or as being contrary to natural justice. We cannot look out of the special case for an explanation of the nature of the judgment.

In the description of the original proceeding the case states that while the ship was in the port of *Havre, Trotteux & Co.* commenced

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and prosecuted a suit against *William Benson*, the master of the ship, in the Court of the Tribunal of Commerce at *Havre*, and "against the said ship." It was argued for the Appellant that from the other facts stated in the case, the words "against the said ship" may be understood that the ship being available for payment of a bill given by the master for necessaries supplied during a voyage, the suit was against the master personally, and only indirectly and by consequence against the ship.

But assuming this to be so, it is stated in the case that according to the law of *France* a sale of the ship could take place only after the judgment of the Court of Commerce was confirmed, and the sale of the ship ordered by a judgment of the Civil Tribunal of the district in which the said Court of Commerce was situated. And the case states a judgment in the Court of Commerce, and the seizure of the ship and her appurtenances in pursuance of the judgment. And that "proceedings were afterwards instituted in the Civil Tribunal of *Havre* (being the Civil Tribunal of the district in which the Court of Commerce is situate), and in default of the appearance of the parties summoned a judgment by default was given, and duly recorded in the said Civil Tribunal of *Havre*, by which the seizure of the ship and its appurtenances was confirmed." And it was ordered that the ship and its appurtenances should be sold by public auction to the highest bidder at the sittings for sales of the Civil Tribunal. This order for the sale of the ship, whatever may be thought of the original proceeding, appears to be a judgment *in rem*. Without, however, looking to this ultimate order, I think that the original proceeding being for the purpose of enforcing a maritime lien, which by the law of all foreign codes founded on the civil law exists for money advanced for repairs and necessaries on a voyage, was a proceeding *in rem*.

But, then, it is said that the law to be applied to this case was the English law, and by that law there is no charge or lien on the ship for necessaries supplied to the master during a voyage, and the Courts at *Havre* acted erroneously and in ignorance of the law they were administering. But no proof was offered to the French Courts whether by the law in existence at *Melbourne*, where the bill was drawn by the master of the ship, there was or was not a lien on the ship for necessaries, and they might well assume, in the

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absence of evidence, that the general maritime law of lien prevailed and attached upon the master's contract.

Assuming that there was a mistake of the law, still this error will not render the French judgment void in this country. Even if evidence had been offered to the French Courts of the English law applicable to the case, and they had honestly come to an erroneous conclusion upon the subject, their judgment could not be impeached in our Courts.

To sum up my opinion in the words of Mr. Justice *Blackburn*, and the other learned Judges who concurred with him, "I think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the State under the authority of which the Court sits; and, secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world."

For the reasons thus shortly expressed, I am of opinion that the judgment of the Court of Exchequer Chamber ought to be affirmed.

LORD COLONSAY:—

My Lords, I entirely concur in the judgment which is proposed to be pronounced in this case. It appears to me that we cannot enter into an inquiry as to whether the French Courts proceeded correctly either as to their own course of procedure, or their own law, nor whether, under the circumstances, they took the proper means of satisfying themselves with respect to the view they took of the English law. Nor can we inquire whether they were right in their views of the English law. The question is, whether under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship, and did order the sale of the ship. I think the Respondents are entitled to judgment; and that the judgment of the Court below ought to be affirmed.

Mr. *Crompton Hutton* applied to have the record amended in a formal matter. The two original Defendants had died, and the

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representative of each had been added as a Defendant, whereas it should have been the representative of the survivor.

An order was made accordingly.

It was Ordered, that one of the Masters of the Court of Common Pleas do attend at the Bar to amend the judgment roll by substituting a suggestion with respect to the representative of the last surviving Defendant in the place of the suggestion entered on the 22nd of April, 1869, with respect to the representative of each of the two Defendants.

Judgment of Court of Exchequer Chamber affirmed.

Lords' Journals, 4th April, 1870.

Attorney for Plaintiff in Error: *T. J. Horwood.*
Attorneys for Defendant in Error: *Field, Roscoe, & Co.*

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June 29;
July 1.
1870
Feb. 18;
April 4.

THE QUEEN (ON THE PROSECUTION OF THE MAYOR AND BURGESSES OF SOUTHAMPTON) . . . . . } PLAINTIFF IN ERROR;

AND

THE COMMISSIONERS OF THE PORT OF SOUTHAMPTON . . . . . } DEFENDANTS IN ERROR.

Local Acts—Southampton Docks—Compensation for Dues.

A direction in a mandamus to take measures for "obtaining and recovering payment" does not necessarily mean to bring an action, and such a direction, therefore, though not accompanied by a tender of indemnity, does not make the mandamus invalid.

The Acts which regulate the port and docks at *Southampton* do not take away from the Mayor and Corporation of that town the right to receive the compensation originally granted to them in respect of the loss of petty customs and anchorage and groundage dues which before the passing of these Acts they were entitled to receive; nor is their right to that compensation affected by the fact that the *Municipal Corporations Act* directs all their funds to form part of a borough fund, which is to be employed and applied to the purposes and in the manner provided for by that statute.

Certain payments were (by clauses in local Acts of Parliament) under certain circumstances, to be made by a body of persons owning the docks of a town to another body of persons constituting the Commissioners of the port of that

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town, out of which payments one-fifth was to be handed over to the Corporation of the town. For this uncertain sum of one-fifth a certain sum of £1000 was afterwards substituted. From circumstances provided for by the local Acts which regulated these matters the Commissioners did not receive, and, in consequence of other circumstances connected with the docks and the town, did not attempt to enforce, payment of the moneys from the Dock Company. The Corporation sought to compel the Commissioners to continue the payment of what was or might have been received, on an amount calculated on a recognised deficiency, and obtained a mandamus for that purpose. The mandamus alleged that the Commissioners had been required by the Prosecutors (the Mayor and Corporation) "to take the necessary and legal measures for obtaining and recovering payment to them of the said deficiency, and to pay over, &c.," and it went on to enjoin the Commissioners to take "the necessary and legal measures and proceedings" for obtaining and recovering payment, &c. It did not allege any tender of indemnity to the Commissioners for the possible costs of doing what was there required:—

Held, that the mandamus was sufficient in form; that it did not necessarily imply that the Commissioners were to bring actions to recover the money; and that, consequently, there was no necessity to accompany it with the offer of an indemnity as to costs.

Where Commissioners are, by an Act of Parliament, authorized to receive certain money, and at the same time directed to pay a portion of those moneys to another body of persons, the gross sum received is to be deemed the "income" of the Commissioners, and the persons to whom the payment is to be made have an "interest" in that portion, and are entitled to enforce payment thereof.

IN this case a writ of mandamus had issued out of the Court of Queen's Bench commanding the Defendants to take "the necessary and legal measures and proceedings for obtaining and recovering" from the *Southampton Dock Company* several sums of money alleged to amount to £3710 7*s.*, and pay over (allowing certain deductions) one-fifth part thereof to the Prosecutors. The writ set forth in substance the 43 Geo. 3, c. xxi., and the 50 Geo. 3, c. clxviii., the objects of which were to abolish certain dues and petty customs and anchorage and groundage dues theretofore levied at *Southampton*, and to make docks there. These dues had originally been received by the Mayor and Corporation of *Southampton*, and these Acts in abolishing the dues gave to certain persons, thereby constituted Commissioners of the Port of *Southampton*, the power to collect other dues, and, by way of compensation to the Mayor and Corporation, directed that there should be paid to them and their successors, yearly, one-fifth of the duties which the Commissioners were empowered to raise. The writ then recited the

6 Will. 4, c. xxix., which incorporated the *Southampton Dock Company* for the purpose of constructing certain docks at *Southampton*. By this last-named Act (clause 121) the docks thereby authorized to be made were to be deemed part of the port of *Southampton*, and all ships resorting to these docks were to be subject to the various duties authorized by the two preceding Acts to be taken by the Commissioners. By the 124th clause of 6 Will. 4, c. xxix., provision was made against any loss or diminution of income that might be suffered by the Commissioners, and the Dock Company was directed to pay them out of the rates thereby authorized to be taken such annual sum as should be sufficient to make up the annual sum derivable in respect of goods, &c., to such an annual amount as should equal the average annual income derived by the Commissioners therefrom during the three years next before the passing of the Dock Act. The writ then alleged the repeal of this clause 124 of the 6 Will. 4, c. xxix., by the 52nd clause of the 6 & 7 Vict. c. lxv., and the substitution for it of another provision by the 53rd clause of this last-named Act, which declared that, instead of making up the income of the Commissioners to the average annual amount of the three years preceding the passing of the Dock Act, the Dock Company should pay to the Commissioners such annual sum as should make up the deficiency of dock duties, and should be sufficient to make up the annual income derived, &c., in respect of goods, &c., to the annual sum of £1000. The writ then alleged that for the year 1847 and the eleven following years the annual income of the Commissioners fell below the sum of £1000, and that the diminution amounted for the twelve years to £3710 7*s.*; that no part of the deficiency had been paid by the company to the Commissioners; and that no part of the deficiency had been paid by the Commissioners to the Mayor, &c., the Prosecutors; and that the Commissioners (the Defendants) had been required by the Prosecutors, but had refused, "to take the necessary and legal measures for recovering payment to them of the said deficiency from the *Southampton Dock Company*, and to pay over the one-fifth part thereof to the Mayor, &c.;" and the writ went on to enjoin the Commissioners "to take the necessary and legal measures and proceedings for obtaining and recovering payment to you" (the Commissioners) "by and from the said *Southampton*

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Dock Company" of the said deficiency, and to pay over one-fifth part thereof to the said Mayor, Aldermen, &c.

The Defendants, on the 15th of April, 1860, made a return which set forth the various Acts, and alleged that during the year 1847 and the eleven following years, in the duties received by the Commissioners of the Port of *Southampton*, there had been an increase in the receipts of the Commissioners in considerable excess over the £1000, and that the Commissioners had on that ground come to a resolution that there was no necessity whatever for an application to the Dock Company; that the Commissioners had paid and the Prosecutors had duly received from the said Commissioners during those twelve years one-fifth of the sums obtained by them from dues for goods, &c., and had accepted such payment as and for the compensation provided by the 43 Geo. 3, c. xxi. It farther alleged, that at a meeting of the town council of the borough of *Southampton*, held on the 9th of March, 1859, a resolution was passed by fifteen against five "that there was no ground for an application to the *Southampton Dock Company* for money," which resolution of the town council had been approved at the ward meetings of the borough. The return farther alleged that the Commissioners had from time to time applied the money thus raised under the Acts to the works authorized by those Acts, and alleged that it was the opinion, as well of the Prosecutors as of the Commissioners, as expressed at various meetings, that no such measures as were commanded by the writs should be taken against the Dock Company.

The Prosecutors, in their plea to the return admitting the receipt of the one-fifth as alleged, denied that they had taken it in satisfaction of the compensation secured by the Acts. They also pleaded a denial of the alleged resolution of the Commissioners, of the alleged resolution of the town council, and of the alleged opinion of the Prosecutors and the Commissioners. They also demurred to the return on the ground that it disclosed no sufficient reason for omitting to take the proceedings commanded by the writ.

The Defendants, by their replication, took issue on the first plea, and alleged that the Prosecutors did not, until after the 25th of March, 1859, claim any other sum than the said one-fifth as due to them under any of the Acts. They also took issue on the other pleas, and demurred to each as raising an immaterial issue. Joinder, &c.

In April, 1861, the demurrers came on for argument in the Court of Queen's Bench, and judgment was given for the Prosecutors (1). In July, 1861, the issues of fact were tried before Mr. Baron *Channell*, at the *Hampshire* Assizes, when a verdict was found for the Plaintiffs on the issues joined on the first and fourth pleas, and for the Commissioners on the second and third pleas. The damages were assessed at £742 1*s*. In February, 1864, judgment was given that a peremptory mandamus should issue. This judgment was, February, 1865, reversed in the Exchequer Chamber (2), on the ground that the Prosecutors were not, under the Acts, entitled to receive any part of the deficiency payable by the Dock Company for the purpose of making up the annual income of the Commissioners in respect of goods, &c., to the sum of £1000, the Corporation not being mentioned in any of the provisions which gave compensation to the Commissioners of the Port of *Southampton* (3).

The Judges were summoned, and Mr. Baron *Bramwell*, Mr. Justice *Blackburn*, Mr. Justice *Keating*, Mr. Justice *Mellor*, Mr. Baron *Cleasby*, and Mr. Justice *Brett*, attended.

Sir *J. B. Karslake*, Q.C., and Mr. *Archibald*, for the Prosecutors :—

The mandamus ought to issue in this case. The Prosecutors

(1) 1 B. & S. 5, where the mandamus and return are fully set out.

(2) 6 B. & S. 325.

(3) The case in the Exchequer Chamber is not reported. In the judgment of Lord Chief Justice *Erle*, delivered on behalf of the whole Court, it was said: "The Legislature may well have provided that now you, the Commissioners, lose some of the dues that you are entitled to, there shall be a compensation arrangement between you and the Dock Company, but as to the Corporation, the Act is entirely silent about giving compensation. It is not a substituted fund—it is a new dock due. I may say that I notice in some of the sections of the 6 Will. 4, that the Corporation is mentioned several times, and so it is in the 6 & 7 Vict. I do not think that it would be expedient to refer to the particular sections at this time, but several of the sections mentioned the Corporation, and it seems to me that if the income of the Corporation was to have been saved from loss or diminution by the making of the docks, a provision to that effect would certainly have been found in the Acts, but the Acts leave that matter in perfect silence. As to the saving of the rights of the Corporation, they are saved, except so far as the provisions of this Act shall affect them. It leaves it thus: that as to any moneys to be received by the Corporation, that, in respect of moneys to be received by the Commissioners from the Dock Company, the Corporation has no right to demand one tittle."—Printed Papers in the case, p. 30.

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have a clear legal right to this fund; the Commissioners are bound to obtain it, and to pay over to them a settled portion of it. The intention of the Acts was, that the income of the Corporation from this source should be made up to £1000 a year. There is no doubt that that income is subject to the provisions of the *Municipal Corporations Act*, and must, when received, form part of the borough fund, and be applied to the purposes of the Corporation; but, at all events, the Prosecutors have a clear legal right to receive it, and the way in which, by the enactments of a subsequent public statute, the money so received is specifically to be applied, cannot affect that right. The 9 Vict. c. xxvi., which recited the Acts of 43 and 50 Geo. 3, expressly, by clause 12, saves all the existing rights of the Corporation, except only such as were distinctly taken away by that Act, and the right to receive this money was certainly not so taken away. Such being the case, the right of the Corporation to ask for this mandamus is clear, for a legal right exists, and there is no other form of a legal remedy for enforcing it: *Rex* v. *Marquis of Stafford* (1). The Court will not put such an interpretation on clauses of Acts of Parliament as will defeat, but rather such as will sustain, the existing and recognised rights of parties interested.

The mandatory part of the mandamus is sufficient in form. That part directs the Defendants to "take the necessary and legal measures and proceedings for obtaining and recovering payment to you by and from the *Southampton Dock Company* of the said several sums of money," &c.; "and that you pay over one-fifth part thereof to the Mayor, Aldermen," &c. It is said that that form is too vague and general, as it might imply a command to bring actions at the risk and cost of the Commissioners. But the command is to take such steps as may be legal, and that does not necessarily mean to bring an action.

Mr. *Joseph Brown*, Q.C., and Mr. *Mellish*, Q.C. (Mr. *Murphy* was with them), for the Commissioners:—

The real question here is now narrowed to the construction of the 124th clause of the 6 Will. 4, c. xxix., the Act for making the docks. That clause professes to be made for the purpose of "pro-

(1) 3 T. R. 646.

viding against any loss or diminution of income which might be sustained by the Commissioners," and it requires that the sum to be paid to them shall equal the average annual income of the past three years. But the Commissioners were to be at liberty to reduce the rates, and then the payment to them might be proportionably reduced; and that clause contains not one word as to providing against loss or diminution so occasioned to the Prosecutors, the Mayor and Burgesses of the town. The only conclusion, therefore, is, that the Legislature did not intend that there should be on their part any right to compensation on account of this possible loss. The town would be sufficiently benefited in other ways; and now, by the *Municipal Corporations Act*, the whole object of a corporation receiving money is to apply it for the benefit of the town, and if that benefit is, as it is in this case, otherwise provided for, the public object which the Legislature had in view is answered.

The form of the mandamus is erroneous. It does not command a specific act to be done, such as to pay money, but commands proceedings to be taken, which may or may not result in the payment of money, or in anything which it is the supposed object of the mandamus to effect. The Commissioners are not to be required at their cost to take proceedings against the Company, yet no indemnity is alleged to have been tendered.

The following questions were put to the Judges:—

1. Whether the writ of mandamus in this case is good and sufficient?

2. Whether, according to the construction of the Acts of Parlianent relating to the port and docks at *Southampton* respectively, the income of the Commissioners, arising from rates, duties, and payments in respect of goods, wares, and merchandize, referred to in the 124th clause of the Act 6 Will. 4, c. xxix., is to be taken as inclusive or exclusive of the one-fifth share payable to the Corporation of *Southampton* out of the same rates and duties?

MR. BARON CLEASBY:—

My Lords,—In this case a mandamus issued, tested the 13th of January, 1860, and commanding the Defendants to take the neces-

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sary and legal measures and proceedings for obtaining and recovering payment from the *Southampton Dock Company* of the sum of £3710 7*s.*, and to pay over one-fifth part thereof, with certain exceptions, to the Prosecutors. This sum of £3710 7*s.* is the aggregate of the yearly deficiencies between the income of the Commissioners derived from tolls on goods and merchandize and the sum of £1000 for the year 1847 and the eleven following years.

The Prosecutors allege the Defendants were entitled to receive from the *Southampton Dock Company* the deficiency of each year, and ought to have paid one-fifth part to them.

By the return to the mandamus the Defendants allege (among other things) that for the year 1847, and eleven following years, the amount received by them for duties on goods and merchandize, and for tonnage and boomage on ships, had much exceeded £1000, and that they had regularly accounted to the Prosecutors for the one-fifth, which they had accepted as the whole compensation to which they were entitled, and did not until August, 1859, make any farther claim. The return also sets out a resolution of the Mayor, Aldermen, and Council of the borough of *Southampton*, dated the 9th of March, 1859, to the effect that no farther application should be made to the Dock Company.

To this return the Prosecutors demurred, and there was a joinder in demurrer. There were other pleadings and demurrers, but it is unnecessary to advert to them, particularly as the questions are sufficiently raised by the demurrer to the return. This demurrer was heard before the Court of Queen's Bench in April, 1861. The argument was not upon the validity of the return, but upon the form and legality of the writ. Upon that question there was a difference of opinion. The Lord Chief Justice thought the writ bad, as commanding too much. The other two Judges, Mr. Justice *Crompton* and Mr. Justice *Blackburn*, thought the writ good. The result was, that judgment was given for the Prosecutors on the demurrer.

Afterwards, the issues in fact having been tried and judgment given for the Prosecutors, the whole record came before the Court of Exchequer Chamber, and that Court, composed of six Judges, unanimously reversed the judgment of the Queen's Bench. This

was done upon a ground which does not appear to have been much considered in the Court below, viz., that the Acts of Parliament did not confer upon the Prosecutors any right to one-fifth of the deficiencies to be made up by the Dock Company, which are referred to in the writ. Being clearly of this opinion, the Court did not not advert to any of the objections which had been urged against the form of the writ, so that no assistance can be derived from the opinions of the Judges composing that Court upon this part of the case.

Upon this judgment of reversal Error has been brought into your Lordships' House, and after full argument two questions were proposed by your Lordships to the Judges:—[The learned Baron read the questions.]

In considering these questions, the first thing to be ascertained is, what is the precise effect of the first Act, namely, that of 43 Geo. 3, c. xxi., which established the Commissioners of the Port of *Southampton*, as to the rights conferred upon the Prosecutors. It entirely abolishes certain dues to which the Corporation of *Southampton* had been up to that time entitled, and enacts that there shall be paid to the Defendants certain rates for goods exported from, or imported into, the port of *Southampton*, and also certain tonnage and boomage dues for all vessels using the port; and afterwards, by clause 19, enacts that, by way of compensation to the Corporation for the loss of the duties abolished, the Commissioners shall pay to the Corporation one-fifth part of the net amount of the duties received, and also of forfeitures recovered in each year. By certain clauses of the Act (40 to 53) various penalties and forfeitures are enforced, and the Mayor and Aldermen are to receive one-fifth of these, as well as of the duties. This may either be regarded as giving the Corporation a share in the duties and forfeitures themselves, and making the Commissioners trustees for such share, or as entitling the Corporation to receive yearly from the Commissioners a payment varying, as interest or preferential dividend might do, with revenue, and equal in this particular case to the one-fifth mentioned. It would make a considerable difference which was the correct view; because if the Corporation could be regarded as entitled to a share of the duties themselves, then, under whatever form compensation was

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given for the loss or diminution of these duties, the Mayor and Aldermen would be entitled to their share, whereas if they were only entitled to a payment measured by what the duties yielded, then the diminution of the duties, however caused, would cause a corresponding diminution of the payment, and they would be the losers, unless compensation was given by the Legislature for the diminution.

Clauses 17, 19, and 20 are those which bear upon this question. Clause 19 directs the Commissioners to apply the moneys received for duties and forfeitures, after deducting the expense of collecting and recovering the same, in the first place, in payment of one-fifth part to the Corporation as compensation, and afterwards in maintaining the works. It might appear from this, that the Commissioners had to receive one-fifth for the Corporation, and to give the latter an interest in the duties, &c., to that extent; but the language is rather against this, because the Commissioners are to apply the receipts (other than and except the expenses) in the manner indicated. And clause 20, which directs the treasurer to pay to the Prosecutors such half-yearly payment as shall become due to them in manner aforesaid on the half-yearly settlement of the accounts of such receipts of duties and forfeitures as aforesaid, shews that they were entitled, not to a share of the duties as collected, but to a varying annuity, payable half-yearly; and the end of that clause leads strongly to that conclusion, because it enacts that the payment so made by the treasurer shall be treated in his account as a legal disbursement under the Act. This shews that the payment to the Corporation is one of the expenses of the Commissioners, and special provision is made for ensuring the regular payment. The 17th clause also shews, almost conclusively, that the right of the Corporation is not to a share of the duties, because by that clause the Commissioners have the power of reducing the duties; but if they do so, the Corporation is to receive, not a fifth of the actual duties, but a sum equal to one-fifth of the duties of the previous year.

This view of the case was strongly pressed in argument by one of the learned counsel, and it appears to me to be the correct view. The effect of this Act, therefore, is to make the various duties, viz., the duties on goods, and the tonnage and boomage on ships, and

the forfeitures, form the income of the Commissioners, while the expenses to be paid out of it are the annuity to the Prosecutors (which may be regarded as the purchase-money for their original right), and what is required for the proper maintenance of the various works and interest on loan. In some sense the four-fifths may be regarded as the income of the Commissioners, but speaking correctly it is not so any more than the one-fifth. The four-fifths must be expended in a particular way, as well as the one-fifth.

I will only add, upon this part of the case, that the right to receive a dividend or share of the net income derived from a particular source does not of itself confer any legal or equitable interest in the source from which the income is derived. This has been decided as regards land in cases arising under the Mortmain Acts: *Myers* v. *Perigal* (1); *Edwards* v. *Hall* (2); and in cases involving the right of voting for counties: *Bennett* v. *Blaine* (3); *Freeman* v. *Gainsford* (4). I beg to refer to what Mr. Justice *Williams* says in the first of these cases: "The principle established is, that under such a deed of arrangement a shareholder has no direct interest in the tolls, rates, or other income of the company, or in the land, plant, machinery, or other property held by the company, but only a right to share in the profits when realized." And afterwards, "no shareholder has any interest, either at law or in equity, in any particular portions of the income, but only in his share of the profits."

In the present case, the utmost right of the Prosecutors is to a proportion of the net amount of all the duties and forfeitures, after deducting expenses. This does not confer any interest, legal or equitable, in any particular duties; those, for instance, on goods, which form the separate subject of subsequent legislation, but only a right to receive a part of the net income derived from the whole. The above decisions have been adverted to as having some bearing upon the particular interest of the Prosecutors in the present case, but their correctness, if questioned by your Lordships, is not essential to the present conclusion, which is founded upon the particular language of the 17th, 19th, and 20th clauses of the Act, shewing that the Prosecutors are not to have a share of the

(1) 11 C. B. 90.
(2) 6 De G. M. & G. 74.
(3) 33 L. J. (C.P.) 63; 15 C. B. (N.S.) 518.
(4) 34 L. J. (C.P.) 95; 18 C. B. (N.S.) 185.

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duties, &c., but an annuity payable half-yearly, regulated in general by the amount of the duties of the current year, but in some cases by those of the previous year.

If this be the proper construction of the Act 43 Geo. 3, c. xxi., constituting the Commissioners, the construction of the 6 Will. 4, c. xxix., presents less difficulty. At that time another great public work was to be executed, by providing docks for the town of *Southampton*, and this was to be done by persons who formed a company, and applied of course to Parliament for powers. Now upon the completion and opening of these docks, by clause 123, goods would be landed at or shipped from the docks of the company, which would not pay the duties on goods to the Commissioners, and thus there would be a diversion of traffic from the quays of the Commissioners to the docks of the company. This diversion of traffic would not in general form a necessary subject of compensation where private interests only were concerned, as was urged in argument at the Bar, but the maintenance of the port and its works was a matter of great public importance, and therefore provision must be made that sufficient funds remain for this as well as the other necessary repairs of the Commissioners. Accordingly we have clause 124. It is to be observed that the docks caused no diminution of the duties on ships for tonnage and boomage, but only of the duties on goods landed and shipped; and, therefore, by the clause for providing against any loss or diminution of income which might be sustained by the Commissioners, it is enacted that the company shall pay to the Commissioners such annual sum as shall make the income of the Commissioners derived from the duties on goods equal to the average of the income from the same source for the three years previous to the passing of the Act.

I have before pointed out that the several duties and forfeitures formed the income of the Commissioners alone, and therefore their income alone would be directly affected by the diminution of the duties on goods; but as the annuity to the Prosecutors must vary with the amount of those duties, they would indirectly suffer by the same diminution, and therefore theirs was a case in which the Legislature might give compensation, if they thought there was sufficient ground for it.

There can be little doubt that the matter was debated and considered before the Committees of both Houses, and, in my opinion, the Legislature has not given the Prosecutors any compensation. And there seems to have been good reasons for their not doing so. In the first place, the annuity of the Prosecutors was in respect of what had been their private property, and injury to private property caused solely by a diversion of traffic is not in general a subject for compensation; secondly, at the time of the passing of this Act of Parliament the annuity was payable into the borough fund, in which the town of *Southampton* was no doubt interested. But it would conduce more to the prosperity of the town to have the various port duties lowered, than to have the borough rate lowered, and as it was only a question between two public funds, the funds of the Commissioners and the funds of the borough, the preference might well be given to the former, especially as in that way the trade and commerce of *Southampton* would be promoted, which was the great object of all this legislation.

But there is another reason why it was unnecessary to compensate the Prosecutors. The annual payment which they had all along been receiving, and were entitled to receive, by virtue of the 19th clause of 43 Geo. 3, depended upon the produce of the tonnage and boomage of ships as well as the duties on goods. The former was rapidly increasing, and would probably continue to increase more by the opening of the docks. We do not know what the increase was for some time, but it appears by the return to the mandamus that in the year 1847 it amounted to £1,629 2*s.* 9*d.*, and in the year 1858 it had gradually increased to £2,692 13*s.* 4*d.*

This increase is far greater than the diminution of receipts from duties on goods, so that the Prosecutors have received, and it was to be expected they would receive, in the increase of the one a full compensation for the decrease of the other. And the Act of Parliament, though it gave them no compensation, yet secured to them this advantage, for by the 182nd clause all the rights of the Corporation are secured; and in my opinion this clause was the result of the discussion which must have taken place on the subject, and it contains all which the Legislature intended in favour of the Prosecutors.

I have before pointed out what I consider those rights to be,

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namely, an annual payment to an extent equal to one-fifth of the duties and forfeitures received by the Commissioners. I have not found anything in the Acts of Parliament to repeal the 17th clause of 43 Geo. 3, by which upon any reduction of duties by the Commissioners the Prosecutors are entitled to be paid for the first year after the reduction upon the footing of the receipts of the previous year. This provision, therefore, remains in force, being expressly reserved with all other rights by the 182nd clause of 6 Will. 4, above referred to, but it would be wholly inapplicable, so far as the duties on goods are concerned, if the Prosecutors are to share in the amount guaranteed by the Dock Company.

And by considering clause 17 of 43 Geo. 3, in connection with the 124th clause of 6 Will. 4, the following conclusion appears to be a correct one. The latter section is the one upon which the whole question turns, and there is a proviso at the end of it that if the Commissioners reduce the duties the Dock Company is not bound to make up to the average the amount of the duties so reduced, but only the amount which the duties would have realized if they had not been reduced, so that if the average was £1000, and the duties would have amounted to that sum if not reduced, but in consequence of a reduction they only amounted to £750, the company would have nothing to pay to the Commissioners, but still the Commissioners would have to pay the Prosecutors the one-fifth of the previous year, namely, £200. This shews that what the Commissioners have to pay to the Corporation depends not upon what they get from the company, but upon the amount of duties, and the Prosecutors get their payment whether the Commissioners get it from the company or not.

The Act of 6 & 7 Vict. c. lxv., makes it the duty of the Dock Company to make up the income of the Commissioners derived from the duties on goods, not to any average of previous years, but to £1000 a year, and it makes this obligation independent of any reduction which the Commissioners may make on those duties, thereby repealing the proviso to clause 124 of 6 Will. 4. An argument was raised by the learned counsel for the Prosecutors upon this, viz., that the Commissioners might reduce the tolls to nothing, and then, unless the Prosecutors were entitled to a fifth of the £1000 they would get nothing. This argument is no doubt

entitled to some consideration; and if the effect of holding that the Prosecutors were not entitled to a share of the £1000 would be really to leave it to the option of the Commissioners whether they should get anything or not, I should hesitate in so holding. But it may be said in answer, first, that it is impossible to hold that the Prosecutors are entitled to a share of the £1000 under the 6 & 7 Vict., unless they were also entitled to a share of the compensation, making up the average under the 6 Will. 4, and the argument in question does not apply to the earlier statute, because by the proviso to the 124th section the Commissioners by reducing the duties reduce also the compensation. But in reality the argument is of no weight, because it only applies to the duties on goods, which is a small part of the income of the Commissioners. It appears by the return to the mandamus that in the year ending March, 1858, the duties on goods amounted to £598 2*s.* 8*d.*, whereas the tonnage and boomage duties amounted to £2,692 13*s.* 4*d.*, and this latter amount is wholly independent of the £1000 compensation, and the Prosecutors have of course always received an amount equal to one-fifth of the latter duties. The argument, therefore, which is only directed to the inconvenience and supposed injustice of the conclusion, fails altogether.

It must also be borne in mind that so far as any property of the Prosecutors was taken they were entitled to compensation, and very special clauses are introduced into the Act of Parliament for compensating them for any property of theirs which was taken (see 21st and following clauses), and by clause 26 they are to be entitled to nominate one of the council to be a director in the Dock Company. This proves that they were before Parliament when the Act was passed. I think these clauses were doubtless inserted at their instance, and I cannot help thinking that if they were intended to derive any benefit under the 124th clause they would have taken care to be named in it or to have it more distinctly appear.

It is, I think, a strong confirmation of the argument against the Corporation having any interest in the compensation for deficiency under £1000 that the Commissioners have in their hands such means of diminishing or increasing that deficiency. For example, the yearly exigencies of the Commissioners may be taken, for the

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sake of illustration, to have been in round numbers £3000. It appears that for the three last years given they were something over that sum. This had to be raised by duties on goods, and by duties on tonnage. But the Commissioners can, within certain limits, raise or diminish these duties. They have, therefore, only to raise the duties on goods, and the amount derived from them would approach or reach £1000, and the duties on tonnage would be correspondingly reduced. The effect would thus be certainly to reduce the payment from the docks to the Commissioners, and perhaps to a trifle or to nothing, and the one-fifth said to belong to the Prosecutors would go in the same way. Of course, if it be assumed that the duties are always at this maximum rate, then as long as the exigencies of the Commissioners required this to continue the argument would not apply. But the Act which entitles the Commissioners to have the duties on goods made up by the Dock Company to £1000, was passed in the year 1843, and the same clause which does this, clause 53, expressly authorizes the Commissioners to reduce or vary the duties on goods, and they are still to have the amount made up to £1000. The reduction of these tolls on goods is therefore contemplated, and it appears that in the year 1849 and previous years the duties on goods amounted to nearly £1000; and the following year they amounted to about £600.

It does not appear reasonable to infer, unless the inference be a necessary one from the other facts, that the Prosecutors had any interest in a fund over which the Commissioners had such complete control.

The same remark does not apply to the substantial fund to which the Prosecutors looked for their compensation under the 43 Geo. 3, c. xxi, because the Commissioners must regularly raise by tolls a large sum sufficient to pay the expenses of the works, interest of loan, and the yearly payment to the Prosecutors. They cannot reduce the tolls so as to affect this amount, and to one-fifth of it the Prosecutors are entitled.

For the reasons above given, the proper conclusion derived from the consideration of all the Acts and the subject matter is, that the Prosecutors are entitled to receive what they have received, viz., an amount equal to one-fifth of all the duties and forfeitures, and

have no claim under the 124th clause. And this is the conclusion adopted by the unanimous judgment of the Exchequer Chamber.

This was what may be called the contemporaneous exposition of the statute, acted on for many years (a matter not to be lost sight of), and the attempt to give a different effect to the words seems to have been an afterthought; and the consequence might be, that if the Commissioners were now to recover from the company the whole of the yearly deficiencies of the duties on goods, and pay over the one-fifth to the Prosecutors, they might really, to the extent of that one-fifth, be paid twice over. For, supposing the Commissioners have raised by tolls all the money which has been required for the purposes of their Acts, then, if they had received from the Dock Company the yearly deficiencies, they would have been bound to reduce the duties to the same extent, and the Prosecutors would have thus received the one-fifth of the reduced duties only, except in the first year of the reduction, when by the express terms of the 17th clause of the first statute they would have been entitled to be paid upon the scale of the previous year. They have, as the case stands, been paid all along the one-fifth of the full duties, because the Commissioners have not claimed the deficiency from the company, and therefore have not reduced the duties.

As the result of what has been said, I humbly give my opinion, in answer to the second question put to the Judges (which is the more important one), that the income of the Commissioners, referred to in the 124th clause, is their income derived from the duties, wholly independent of any payment which they are bound to make to the Prosecutors. Thinking that the Prosecutors are not entitled to any share in those particular duties, I am unable to answer the questions more directly.

With regard to the first question, viz., the validity and sufficiency of the mandamus, of course if the view which I have taken be correct the Prosecutors have no share in the £1000 compensation, and there exists no legal duty to pay over the one-fifth to them, and the foundation for the mandamus fails. But supposing that the Prosecutors are entitled to one-fifth of the compensation, it rather appears to me that as, under the 124th clause, the Commissioners have the legal title to the whole, they are at most only trustees for

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the Prosecutors as to the one-fifth, and the neglect of the Commissioners to make this fund available would be a breach of trust so far as the interest of the Prosecutors was concerned, but this would not entitle the Prosecutors to a mandamus in a Court of Law, and, as the Lord Chief Justice of the Queen's Bench pointed out, if recourse was had to a Court of Equity, whatever action was necessary for the benefit of the Prosecutors would be directed upon proper terms. But the objection which presses upon my mind as to this part of the case, and to which no answer whatever, that I am aware of, has been given, is this: What right can the Prosecutors have, after the Defendants have adjusted their accounts for eleven years upon a certain footing, and regulated their tolls accordingly, to compel them to call in the arrears of the four-fifths, which they say the Commissioners themselves are entitled to, for all this period, and carry it to the account of one year? Whatever right the Prosecutors may have to make the Commissioners responsible for the one-fifth, I cannot see how they can claim to regulate the conduct of the Commissioners as to the four-fifths.

Without entering more fully into this ground of objection to the mandamus, which it is not in my view necessary to decide, it certainly appears to me if it should be considered that the Prosecutors have any equitable interest in the compensation for diminished duties that such a mandamus as the present is not warranted as the proper course for enforcing it.

The only remaining question is as to the particular language of the mandamus in commanding the Defendants to take the necessary legal measures and proceedings for recovering payment of the sum of £3710. Upon this question there was a difference of opinion in the Court of Queen's Bench, the Lord Chief Justice being against the mandamus, and Mr. Justice *Crampton* and Mr. Justice *Blackburn* in favour of it.

If I was now considering what would be the more correct form of mandamus, I might give way to the Lord Chief Justice's objections to the general form of the present one, but as the Court of Queen's Bench, from which the writ properly issues, has issued it in its present form, and has afterwards decided that the form, though apparently from its general language commanding too much, is according to the practice; and that any return might be made to

it which shewed that it had been complied with so far as the Defendants were bound to comply with it. I think this seems rather a question of regularity of procedure than of law, and I cannot give it as my opinion that on this ground the writ is bad and insufficient.

In conclusion, and for the reasons above given, I respectfully say, in answer to your Lordships' first question, that in my opinion the mandamus is bad and insufficient, because the Prosecutors have not such a legal right as entitles them to call upon the Defendants by mandamus to demand the whole deficiencies from the company, or to pay over the one-fifth to them; but I do not think there is anything in the mere form of the mandamus to vitiate it.

And in answer to the second question, I say that in my opinion the 124th clause of 6 Will. 4, c. xxix., has reference to the income of the Commissioners only, and has no reference to the right of the Corporation to a yearly payment under the 43 Geo. 3, c. xxi.

My Brother *Keating* desires me to say that he concurs in this judgment, and also in the reasons given, except that part which relates to the sufficiency of the mandamus. He thinks that the question proposed to the Judges only relates to the form of the mandamus, and not to its being a proper remedy; so far as regards the form, he concurs in what has been said.

MR. JUSTICE BLACKBURN:—

My Lords,—In answer to your Lordships' first question, my opinion is, that the writ of mandamus is good and sufficient.

In answer to the second question, my opinion is, that the income of the Commissioners referred to in the Act 6 Will. 4, c. xxix (*The Southampton Dock Act*) clause 124, is to be taken as inclusive of the one-fifth share payable to the Prosecutors; that is, in other words, that the Dock Company was to make up the whole loss occasioned by the partial abolition of the dues taken away by clause 123, and not merely the four-fifths which would have been applicable to harbour purposes.

In giving my reasons, I will, with your Lordships' permission, begin with the second question, on which the substantial question as to the rights of the parties depends, before entering on the first question, which is, whether the proper course has been pursued to enforce those rights.

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Before 43 Geo. 3, c. xxi., the Prosecutors were owners of the port, and derived a revenue from certain petty customs and other dues. By that Act the management of the port was transferred to Commissioners, the dues payable to the Corporation were abolished, the Commissioners were empowered to levy duties on ships coming into the port, and on goods exported or imported from the port, and on goods warehoused there, and some other sources of revenue were created, and then, by sect. 19, it is enacted that all the moneys thus raised, "other than so much thereof as shall be allowed" "for the charges of recovering the same," shall be applied "in the first place to the payment of one-fifth part thereof" to the Corporation as compensation for the abolition of the old duties. In my opinion this expressly gave the Prosecutors a right to require that the Commissioners should pay to them a sum of money equal to one-fifth of the revenue (I will not beg the question by calling it income) which the Commissioners received from the various rates, dues, duties, and customs mentioned in the Act. And I think that by implication, though not expressly, it gave them a right to require that the Commissioners should collect the revenue which the Act enabled them to raise. This implication is, I think, much strengthened by the express power given by the 17th clause to the Commissioners to reduce the rates, with a provision as to the effect this reduction shall have on the payment to be made to the Prosecutors. I should farther add, that power is given by clause 24 to borrow £30,000 on mortgage, the payment of which, with interest, is charged on the duties arising by virtue of the Act, subject to the priority of payment to the Prosecutors.

As matters then stand, it seems to be clear that any change which diminished the revenue of the Commissioners would affect the Prosecutors as well as the Commissioners, the loss being borne by both bodies in the proportion of one-fifth and four-fifths; and so anything which increased the revenue would benefit the Prosecutors as well as the Commissioners in the same proportion.

Whilst matters were in this position, a bill was promoted by a trading company, as a private speculation, to make docks in the port of *Southampton*. No doubt it was anticipated, and correctly anticipated, that those docks would be of great public benefit, but so it is in all cases in which a railway or other work is made. The

promoters, for their own private interest, ask power to make a work suggested to be for the public good, and the Legislature generally in such cases attaches as a condition that they shall compensate those whose property is taken away under the authority of the Legislature for the purposes of the promoters. The Act which was obtained by those promoters is the 6 Will. 4, c. xxix., which we have now to construe. The works of the promoters occupy part of the port of *Southampton*, and unless the Legislature had interfered the Commissioners would have been entitled, and as I think bound, to levy duties on all goods imported or exported from that portion of the works which were situated in the port.

Part of the docks, no doubt, were dug out of the solid earth, and perhaps it might have been a question whether, if a vessel sailed through what was the old port of *Southampton* into the dock, which formerly was land, and there unloaded its cargo, that cargo could properly be said to be imported into the port of *Southampton*, so as to be liable to duties payable to the Commissioners. It has been suggested that it could not be so, and that therefore the loss of the Commissioners would be from a diversion of traffic from the port, and that their position would be analogous to that of the tenant of a posting-house suffering from the diversion of traffic occasioned by a railway. But I do not think the Legislature, in passing the 6 Will. 4, c. xxix., was likely to be influenced by what seems to me a distinction too subtle to be very practical, and which at all events could only apply to a part of the works.

Then, by clause 123, it is enacted "that from and after the opening of the docks for the reception of ships and goods, all goods" &c., which shall be landed at or shipped from the company's works "or any parts thereof" shall be exempt from the rates. It seems to me impossible to deny that this was a boon conferred on the Dock Company, and that of every 20*s.* which but for this enactment the Dock Company would have had to pay to the Commissioners the Prosecutors would have had to receive 4*s.* In general, where property is taken away compensation is given to those from whom it is taken. No doubt there are exceptional cases, in which it is not expedient to do so. The Legislature might have thought that the increase of the other revenues of the Commissioners from the increased traffic of the port would fully compensate for the loss of

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those rates on goods thus taken away, and so there was no need to give compensation either to the Commissioners or the Corporation. But it is clear that the Legislature did not take this view, for it gave some compensation. It might have thought that it was inexpedient that a municipal corporation should levy any dues on ships or goods, and therefore took away the 4*s.* belonging to the Corporation, and gave them to the Dock Company, without compensation, though it made the company pay to the Commissioners compensation for the remaining 16*s.* But then I think that if the Legislature intended to do such an unusual and, at least at first view, harsh thing, it would have expressed the intention in clear language, and I cannot find any language indicating such an intention.

The enactments actually passed are contained in clauses 124 and 125, and I apprehend, that without speculating on what might have been enacted, we must collect the intention of the Legislature from the language of the enactment. The point depends on what is the meaning of the word "income" of the Commissioners arising from the rates, &c., in respect of goods, &c., I think that word is (as I have already intimated) equivalent to "revenue." It means the sum received by them from those rates, and has no reference whatever to the mode in which that income or sum is afterwards appropriated. If the Commissioners receive £1000 net revenue from those rates, they are required to pay to the Prosecutors £200, and a charge for the amount of their mortgage debt and the obligation to keep up the port, are imposed on the remaining £800. If the proceeds of the rates are reduced to £500, they are only bound to pay the Prosecutors £100; but if the Dock Company should make up their income to what it was before, they surely must make it up to £1000, and then, though not expressly said, the Commissioners must distribute the "income" thus made up as they would have distributed the income had it never been reduced, that is, by paying one-fifth to the Prosecutors, and applying four-fifths to harbour purposes and the payment of interest on the mortgages raised under 43 Geo. 3, c. xxi., clause 24. I cannot see why the payment to the Prosecutors is to be excluded from the "income" any more than the interest also charged on the revenue. The payment to the Corporation stands upon precisely the same

footing as interest on loan. It would be unbecoming in me to say that this was clear, knowing as I do that a different opinion is entertained by others; but I am unable to find language to make it clearer than as it seems to me the language of the Act already does.

The subsequent legislation merely substituted a fixed sum of £1000 for the varying average income, leaving the rights of the parties unaltered. In the view I take of it, the Prosecutors have the right to receive one-fifth part of that sum which the Dock Company is required to pay to the Commissioners.

My reasons for my answer to the first question may be much more briefly stated. I assume that, for the reasons given in answer to the second question, the Act casts a duty on the Commissioners to get this sum, if practicable, from the Dock Company, and then pay one-fifth to the Prosecutors. The only mode in which the performance of this duty could be enforced at law is by mandamus. It is said the proper remedy is not at law at all, but by a bill in equity, treating the Commissioners as trustees for the Prosecutors. But I see nothing in the Acts creating any trusts or equitable considerations making it necessary to have recourse to a Court of Equity. The duty imposed is a plain legal duty, and though a Court of Equity may have concurrent power to enforce its performance, that does not take away the common law right to a mandamus, which is the proper mode by which one who has an interest in the performance of a legal duty enforces the performance of that duty.

On the question of pleading, which is one of some nicety, I have have little to add to what was said in the Court of Queen's Bench. If the rules of pleading required the mandatory part of the writ to point out and prescribe with particularity what is to be done, it would necessitate intolerable prolixity, and it would be very difficult to foresee and provide for everything so as to be able to frame a good writ. No lawyer in my time had, I think, knowledge of pleading, and particularly of pleading to prerogative writs, superior to that of the late Mr. Justice *Crompton*, and I think that his opinion with regard to the form of the writ may be safely adopted by your Lordships.

I have only to add, that Mr. Justice *Mellor* and Mr. Justice

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Brett (who is unavoidably absent on circuit), agree in this opinion, and desire me to express their concurrence in the reasons stated by my Brother *Bramwell* as well as those I have expressed.

MR. BARON BRAMWELL :—

My Lords, I think your Lordships' questions should be answered in the affirmative.

I propose to consider the second question first. It turns on the meaning of the word "income" in sect. 124 of 6 Will. 4, c. xxix. Does it mean all, or four-fifths of what the Defendants received from the sources therein mentioned? I cannot reason myself into a doubt on the subject; though I must entertain much in deference to the opinion of those who think differently. "Income" is that which comes in, not that which comes in less an outgoing. The fifth the Defendants were liable to pay to the Plaintiffs was an "outgoing," not a diminution of income. In speaking of a man's income from an estate, no one would deduct the interest payable on money borrowed to pay for one-fifth of it. The income of the *United Kingdom* is not its revenue less the interest on the National Debt. It is to be remembered that the clause is arranging between the Defendants and the Dock Company, to whom it was a matter of indifference how the Defendants disposed of their income. It seems to me clear, then, that "income" in clause 124 means the whole five-fifths.

Then does clause 53 of 6 & 7 Vict. c. lxv. make any difference? That seems impossible. It cannot be that if the whole five-fifths were meant by the word "income" in clause 124 of 6 Will. 4, c. xxix., the same word in 6 & 7 Vict. c. lxv. clause 53, means four-fifths only. It was said that these Acts were to be construed in a peculiar way, because these town dues were public property. Now they were certainly not. They were not the property of, nor for the benefit of the whole public, but for that of a portion of the public to the exclusion of the rest, that is to say, the ratepayers and inhabitants of *Southampton*. Then it was said that the town would get a benefit by the docks, and so might well give up their town dues. But it is obvious that there might be some inhabitants and ratepayers no sharers in, and indifferent to, that benefit. Farther, the Dock Company has to pay for land of the Corporation, and why

not for this property? It was said not to be a case for compensation. I am unable to see why not, for the Corporation would, but for this Act, have a right to town dues in respect of all or some of the goods brought to the docks. I think the words and the reason of the thing are equally in favour of the Prosecutors.

But if the Commissioners are still to receive the five-fifths, or £1000, in lieu of the four-fifths, it cannot be that they are to keep them; one-fifth must be for the Prosecutors. That gets over any difficulty from the mere words in 43 Geo. 3, c. xxi., clause 19, "that the Corporation is to have a fifth of what is raised and recovered by the duties aforesaid," because it is manifest that the £1000 are directly or indirectly so raised. The Commissioners are bound to receive the five-fifths, and, after deducting expenses, give one-fifth to the Corporation. As to the other four-fifths, we are not called on to express an opinion; but they are to be applied as directed in 43 Geo. 3, clause 19; and if the Commissioners have a surplus they should reduce their other rates and tolls. It is a fallacy to suppose that the Prosecutors will be paid twice over. All they ask is £200 a year, and as far as they have not received it, to have it made up to them. Contemporaneous exposition cannot be appealed to; for it is certain that the Defendants were entitled for the purposes of their trust to *some* payment from the Dock Company, yet, in fact, they have received *nothing*.

With respect to your Lordships' first question, it may be that the mandamus involves an order to bring an action, if necessary. But it may well do so; for it cannot be that the Defendants' duty is limited to asking for the amount to which they are entitled, and resting satisfied with a refusal, nor can it be necessary that there should have been two writs of mandamus; first, one to ask for the money, then, on a refusal to pay, another to enforce payment. If the Dock Company is insolvent, that should have been returned. If the Commissioners are entitled to an indemnity, the mandamus involves it. But it is by no means clear that they are; for they purchased the town dues with an obligation to collect and pay over a fifth, after deducting expenses. If they have thought fit to deal with the Dock Company as they have, their duty to collect continues, and if there is no right in the Prosecutors to a fifth till the whole is collected, the Defendants must collect the whole,

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whatever they may do with their own four-fifths. I am satisfied with the reasoning of the majority in the Court of Queen's Bench.

I have to add that Mr. Justice *Mellor* and Mr. Justice *Brett* agree with the above, and I may add that I agree in my Brother *Blackburn's* opinion.

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April 4.

THE LORD CHANCELLOR (Lord *Hatherley*), having stated the nature of the case, said:—

My Lords, the case stood thus:—In the Court of Queen's Bench, where the case was originally heard, the Court was of opinion that the mandamus itself was not good and sufficient in consequence of this difficulty, that the mandamus, in fact, directed that the Commissioners should take the necessary and legal measures and proceedings for obtaining and recovering payment to the Commissioners from the *Southampton Dock Company* of several sums of money amounting to £3700 7*s.*, and to pay over one-fifth part thereof, with certain exceptions, to the Prosecutors.

The objection to that form of the writ was, that it seemed to call upon the Commissioners, the Defendants, by way of mandamus, to take legal proceedings, without defining what those proceedings should be—which might be either such as to require an action at law or a suit in equity—and without requiring that the Prosecutors should tender any indemnity in respect of such proceedings. I think those were the principal objections taken; and the learned Judges who have assisted us have considered that question, in the first instance, as one which was necessary to be determined in order that the Court might arrive at the right conclusion in this case.

But the Court of Exchequer Chamber did not proceed upon that ground. That Court, although agreeing with the Court of Queen's Bench in holding that the Defendants were entitled to judgment on the writ of mandamus, proceeded upon the merits of the case, and held that, in truth, the Commissioners were under no such obligation as the exigency of the mandamus called upon them to fulfill, that the sum which was to be raised and payable by the Dock Company to the Commissioners was a sum to make up the income of the Commissioners to a sum of £1000, but that, in dealing with the income of the Commissioners, the Legislature had not had regard in any way to the one-fifth of that income payable

under previous Acts of Parliament to the Dock Commissioners, but had only had regard to the loss which would be sustained by the Commissioners themselves, in which loss was not to be calculated the one-fifth that they had to pay over to the Corporation of *Southampton*, inasmuch as, as it was said in the Court of Exchequer Chamber, that one-fifth was no part of the income of the Commissioners; it was a charge and burden upon that income, and was not, therefore, a sum in respect of which they were to be compensated. And in the judgment of the Court of Exchequer Chamber it was held that there was no intention on the part of Parliament to make any compensation to the Corporation of *Southampton* in respect of any loss which that corporation might have sustained.

My Lords, as regards the question of the mandamus, I concur entirely in the view taken by those of the learned Judges who are of opinion that the writ of mandamus was sufficient, namely, that with reference to the question whether or not the plea put in on the part of the Defendants to the mandamus was a proper plea, and whether the question could be raised as to whether those who were suing out the mandamus could be entitled to compel them to take proceedings without offering an indemnity to them in that respect, it was not necessary in any way, in the first instance, to make that offer, or to point out in the writ of mandamus what proceedings should be taken. That the writ of mandamus itself necessarily assumed a general form, leaving it to those who were called upon to make their return to the mandamus to state in the return such difficulties (if any) as existed in the way of what was required to be done; in other words, that it was not necessary, in the first instance, to point out the course of procedure; that would be done in the return to the writ, and when pointed out, it would have to be dealt with in any course of subsequent dealings that might take place between the parties; and that, standing by itself in its original form, the writ was sufficient. So we have been advised by the majority of the learned Judges, and so, it appears to me, we ought to hold.

Now, as regards the substance of the case, I think that may be very briefly stated; and I confess, notwithstanding the hesitation one ought naturally to feel in coming to a conclusion different from that which was arrived at by the very learned Judge who

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took an active part in the Court of Exchequer Chamber, the then Lord Chief Justice of the Court of Common Pleas, Sir *William Erle*, and those who agreed with him—I confess that I cannot bring my mind to entertain a doubt upon the true construction of these Acts of Parliament.

It appears that the Corporation of *Southampton* had at one time the privilege of collecting certain dues and rates upon vessels which entered the port of *Southampton*, and upon goods; and also certain other dues called anchorage and groundage dues. An Act of Parliament was passed placing the management of these docks in the hands of the Commissioners, against whom the mandamus is now directed.

That Act, which was the 43 Geo. 3, c. xxi., after transferring the collection of these duties from the Corporation to the Commissioners, in the 19th clause enacted as follows: "All and every such sum and sums of money as should be raised and received by the duties aforesaid, or recovered for any forfeiture by that Act appointed, other than so much thereof as should be allowed to the collector or other officer for collecting and managing the said duties, or for charges of recovering the same, should be by the said Commissioners applied and disposed of as follows: in the first place, to the payment of one-fifth part of the said sum or sums of money to the said Mayor, Bailiffs, and Burgesses for the time being and their successors yearly and every year after the commencement of that Act, as and for a compensation for the loss and diminution which would accrue to the said Mayor, Bailiffs and Burgesses by the abolishing the said duties called petty customs, wharfage, cranage, anchorage, and groundage, and from and after the payment thereof, the residue should be applied" by the Commissioners in the manner they have directed, which it is not necessary for me more particularly to specify.

It seems to me to be perfectly clear and plain, therefore, that the Commissioners have power to gather in the whole of the moneys given them in that Act, and that all the moneys they so gather in form the income of the Commissioners, and it is not because a part of that sum of money so gathered in, and forming the income of the Commissioners, has to be paid over to the Corporation of *Southampton*, that it is less the income of the Commissioners,

although they have, in distributing that income, to pay this aliquot portion of it over before they proceed to apply the rest towards the general public purposes of the Act.

In the opinion, however, of the learned Judges in the Court below, and of some of the learned Judges who have advised us (Mr. Baron *Cleasby*, I think, in his opinion takes that view), this is not to be regarded as an interest on the part of the Corporation in the moneys collected by the Commissioners *per se;* but it is simply to be regarded as an annuity payable by the Commissioners to the Corporation of *Southampton*, to be measured by and in proportion to the sums that may be received, namely, that proportion of it which one-fifth would bear to the total sums that they received. The learned Judge (Mr. Baron *Cleasby*) refers to and cites certain cases, both in Courts of Equity and elsewhere, which have determined that the interests of shareholders in a company in the profits of the company do not give them an interest in the concern itself, so that any one shareholder of the company could arrogate to himself the right or title to any portion of the property vested in the whole corporation. I confess I do not see how that has any strong bearing upon the case now before us, because I apprehend if you found something received by a corporation in compensation for certain tolls and duties, every shareholder of the company, though he could not come upon the corporate fund itself, would be entitled to have his share out of the fund which was thus supplied to the corporation, in lieu of certain other funds or certain other property which that corporation possessed. In truth the analogy is hardly an analogy—it is *idem per idem.* I see no substantial conclusion that can be derived from that view of the law, which can at all assist us in determining whether or not we are to regard this money so collected by the Commissioners as income out of which they have to make certain payments, as they would have to pay the interest on mortgages, or any other charges which might be imposed upon them.

This being the state of the case, there is another Act intervening which it is not necessary for us to notice—and then comes the Act which enabled the Dock Company to form the docks at *Southampton*, a work, no doubt, of very considerable importance, which was carried on, however, by a company as a private speculation.

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That being so, it was thought right by the Legislature that the rights and interests of the Commissioners, which were subject to mortgages, and to the payments which they had made of calculated amounts, and which still were to be continued to a certain extent, should be protected, inasmuch as the new rights and privileges given to the Dock Company would have the natural effect of diminishing the income accruing to the Commissioners in consequence of the landing of goods taking place at other ports than those which were occupied and governed by the Commissioners.

Accordingly, it was provided by the 103rd clause, in the first place, that all materials imported into or landed at *Southampton* for the construction of the docks and other works by the Act authorized, should be exempt from all rates, duties, and payments which might have been taken and received under the former Acts, unless the materials should be landed at the quays or wharves vested in the Commissioners. It gave the benefit to the Dock Company (and a very reasonable one it was) of being free from duty in respect of such of the materials landed as were necessary for the construction of the docks.

Then the 124th clause, which recited that "for providing against any loss or diminution of income which might be sustained by the Commissioners acting in execution of the said Acts of the 43rd and 50th years of *George* III." went on to enact "That the said company shall, and they are hereby required to, pay to the said Commissioners for the time being (from and after the opening of the said dock or docks for the reception of ships and goods as aforesaid) out of the rates, rents, and sums hereby authorized to be taken and received, such annual sum as shall be sufficient to make up the annual income of the said Commissioners to be derived under or by virtue of the said last-mentioned Act from the rates, duties, and payments thereby authorized to be taken and received in respect of goods, wares, merchandise, and other commodities, to such annual amount as shall be equal to the average annual income derived by the said Commissioners from the last-mentioned rates, duties, and sums during the three years next preceding the passing of this Act, and that such annual sum shall be computed up to the 25th day of March in each year, and so on.

Stopping at this Act, can it be conceived that it does not require

the dock owners to make good the income of the Commissioners *in toto*, without regard to the one-fifth part (nothing being said as to that) which they are to pay over out of the rents, dues, and duties, when received, to the Mayor and Corporation of *Southampton?* The compensation is to be for all the dues which could be taken by the Commissioners under their Acts. They were authorized to take all those rates and duties out of which the one-fifth was afterwards to be handed over to the Prosecutors. Those Acts undoubtedly did authorize them to receive all those rates, duties, &c., which would form the sum out of which one-fifth was afterwards so to be handed over. There is nothing said in this Act which at all divides those rates and duties into two parts, and says that they shall make up four-fifths of the rates and duties, and no more, but it is simply a sum to be paid which, calculated upon a certain average, would make up the total amount which was received for a given period by the Commissioners from the rates and duties.

The only other Act which relates to the matters in question is one by which the sum necessary to be made up for this purpose was afterwards computed and fixed at the sum of £1000. It is no longer to be held to be at this rate, but it is to be made up to a certain fixed sum of £1000.

Now, what has happened, and which has given rise in some degree to controversy, or else I really think no controversy could have arisen, is this: It is said, true it is that this particular class of rates and duties received by the Commissioners has diminished, and consequently it is agreed that the sum of £3710 7*s.*, which is the amount as to which the mandamus is issued, is the sum which in former years has been required to make up the difference. That is the sum which has accrued in respect of that deficiency. The deficiency has amounted, in those several years, to this sum of £3710. But then the Commissioners say, although it is true that we have lost that class of rates and dues, we have gained very much by the docks being constructed, and upon the whole we have an increased income, although that income has not arisen in respect of these particular rates and duties out of which the Prosecutors claim to receive one-fifth, but in respect of other rates and duties which are payable to us; and therefore we thought it unreasonable and unjust to take any proceedings against the Dock

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proprietors, who, on the whole, have been our benefactors. They have not diminished the total amount of our income, although in respect of the specific thing in question the income has been so diminished. And it is said that the Corporation of *Southampton* at one time thought this view reasonable, and entertained the notion that no proceedings ought to be had for compelling this payment. However, with that part of the case your Lordships' House has nothing to do. We cannot consider whether it is reasonable or unreasonable to take proceedings, regard being had to all the circumstances of the case. We have only to consider what is the debt which has accrued from the Dock Company to the Commissioners, and whether or not the Commissioners should not take steps for enforcing the payment of the debt, regard being had to its being the source out of which they were bound to pay one-fifth to the Corporation of *Southampton*. One learned Judge (Chief Justice *Erle*) viewed it in this light. He said that the town of *Southampton* has benefited by having these docks. At the time the Acts of *George* III. were passed the Mayor and Corporation held the property, in a sense, *quasi* beneficially for themselves, and they have now become merely trustees for the general benefit of the town. And that being the case it is probable that the Legislature did not think it necessary to make any farther provision whatever for the continuance of that payment of one-fifth in compensation to them for what they had lost under the previous Acts of so remote a period as 43rd and 50th *George* III.; in truth, the Legislature only took care that the Commissioners should not be impeded in receiving what they were to receive for their own public purpose, namely, the four-fifths, after deducting the one-fifth which was thus payable to the Corporation of *Southampton*.

I cannot come to any conclusion that that can be justified by any portion of the wording of the Act, or by any construction which may be conceived to be the ordinary and reasonable construction of it. In the first instance the Commissioners are allowed to take out of the hands of another body, the Mayor and Corporation of *Southampton*, a certain amount of profit. It is said by the Legislature: You shall collect the whole of the property yourselves; you shall retain it for the purposes which we think you can manage better than the Corporation can, but the Corpora-

tion shall have one-fifth of what you so collect. Then come another body (the Dock Company), taking from that body, the Commissioners, the sources of income which formed the fund out of which the one-fifth was payable to the Corporation of *Southampton*, and the Dock Company having taken away and appropriated those sources of income, the Legislature says: You, the Dock Company, shall make up to the Commissioners the income which they derive from the rates and dues which they were entitled to collect. I apprehend that as to the whole income which they were authorized so to collect, the Legislature did not intend to look at what they did with their income, either as to paying moneys due upon mortgages, or any other expenses which they might have under their Acts. The object was to place the Commissioners in the position (instead of collectors of a certain amount of dues and rates) of recipients from the Dock Company of what should be equivalent to those dues and rates. These dues have fastened upon them the duty, in the shape of a partnership duty, of paying to the Corporation a share to the extent of one-fifth. That partnership or share must subsist in the moneys paid in to the public purse of the Commissioners in order to enable the Corporation to receive the same amount of income as was received by the Corporation before, and out of that same income which the Corporation formerly received. It appears to me that the payment, whether it be in the way of interest on mortgages, or the payment of one-fifth of the dues received by the Commissioners, must still continue to be made to the Prosecutors. It appears to me that, upon the true view of the whole case, the conclusion which has been come to by the Court of Exchequer Chamber is not the correct one, and that it ought to be reversed.

LORD CHELMSFORD:—

My Lords, the principal question in this case arises upon the 124th clause of the Act 6 Will. 4, c. xxix., and upon the meaning of the words "income of the Commissioners" contained in that clause. I am of opinion that the words are to be taken as inclusive of the one-fifth share payable to the Mayor and Corporation of *Southampton* out of the rates and duties receivable by the Commissioners.

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At the time when the Act of 43 Geo. 3, c. xxi., for improving the port of the town of *Southampton* and creating Commissioners for carrying the Act into execution, was passed, the Mayor and Corporation had, by royal charters, been entitled to receive certain duties, called petty customs, upon the exportation and importation of all goods and merchandise out of and into the port of *Southampton*, and also duties called anchorage and groundage, and wharfage and cranage; and the Act recited that they were willing to relinquish and give up these rights and privileges upon a compensation being made for the loss and diminution which would accrue to them by abolishing the same. The 13th clause of the Act, therefore, enacted that the duties then due and payable to them should cease and be no longer paid, and that there should thenceforth be paid to the Commissioners for all goods, wares, merchandises and commodities exported from or imported into the port of *Southampton*, certain rates, wharfage, keelage, boomage, pier dues, dock dues, and duties. By the 19th clause, the sums raised by these duties were to be applied and disposed of, in the first place, to the payment of one-fifth part of the sum to the Mayor and Corporation as a compensation for the loss and diminution which would accrue to them by the abolishing of the duties I have just mentioned. And a previous clause, the 18th, having given power to reduce the rates, it was provided that such reduction should only be to such an extent as should be equal to pay and make good the annual payment to be made to the Corporation, such annual payment not being less than one-fifth part of the amount of the said rates of the last preceding year. Under the provisions of this Act the compensation to the Mayor and Corporation for the relinquishment of the duties previously received by them was one-fifth of the gross amount of the new duties receivable by the Commissioners.

By 6 Will. 4, c. xxix., the Act for making the docks at *Southampton*, the fund out of which this compensation was to be received by the Corporation was materially interfered with. By the 123rd clause, it was provided that after the opening of the docks all goods, wares, and merchandizes landed at, or in, or shipped from the docks, should be exempt from the rates and duties payable to the Commissioners under their Acts. And to provide against the loss or diminution of income which might be sustained by the

Commissioners, the Dock Company, by the 124th clause, was to pay out of the sums authorized to be taken by the company such annual sum as shall be sufficient to make up the annual income of the Commissioners to be derived from the rates, duties, and payments authorized to be taken and received by them to such annual amount as shall be equal to the average annual income derived by the Commissioners from the last-mentioned rates, duties, and sums during the three years next preceding the passing of the Act.

It appears to me that the word "income" here means the total amount of the rates and duties receivable by the Commissioners, without regard to any outgoings to which it might be subject. Under the Act of the 43 Geo. 3, the one-fifth payable to the Corporation was to be paid out of all and every such sum and sums of money as should be raised and received from the duties. And the loss and diminution of income in the 124th clause of the 6 Will. 4, could mean nothing else than the loss and diminution of the sums received for duties. It would have been most unfair by using the word "income" ambiguously, as meaning the amount of the duties remaining after the deduction of the one-fifth, to deprive the Prosecutors of the full amount of compensation for which they had stipulated as the price of the relinquishment of the duties which they had previously received.

Lord Chief Justice *Erle* in delivering the judgment of the Court of Exchequer Chamber, observed:—"The Corporation in the year 1803, appear to have been in possession of private property, the port dues belonging to the Corporation, as prescriptive rights. After the *Municipal Corporations Act* passed, they had no longer an interest as private owners, but were in the nature of a corporate body, trustees for the town they inhabited, and it was their duty to lay out for the benefit of the town any funds that should come to their hands. The 43 Geo. 3, is to be construed by reference to that consideration, and that statute abolished the town dues." With very great respect, I do not see what bearing these observations can have on the interpretation of the word "income," or how they can in any way aid in determining whether it is to be inclusive or exclusive of the one-fifth of the rates payable to the Corporation.

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Mr. Baron *Cleasby*, in the opinion which he expressed to the House, said there was a reason why it was unnecessary to compensate the Prosecutors: "The annual payment which they had all along been receiving, and were entitled to receive, depended on the tonnage and boomage of ships as well as the duties on goods. The former is rapidly increasing, and would probably continue to increase more, by the opening of the docks. From the return to the mandamus it appears that this increase is far greater than the diminution of receipts from duties on goods, so that the Corporation has received, and it was expected would receive, in the increase of the one, a full compensation for the decrease of the other." One can hardly suppose that these considerations were at all in the view of the Legislature, and led to the use of the word "income" in a different sense from its ordinary meaning. And as to the distinction taken by the learned Judge between the duties on goods and the tonnage and boomage dues, it must be remembered that the Prosecutors, besides their petty customs on goods, gave up duties on anchorage and groundage, for which the one-fifth of the tonnage and boomage dues might have been given as part of the compensation.

The Prosecutors being, then, entitled under the 6 Will. 4, to one-fifth of the rates and duties made up by the Dock Company to the average annual income of the Commissioners during the three years preceding the Act, has their right been at all affected by the 53rd clause of the 6 & 7 Vict. c. lxv., which, instead of providing for the loss or diminution of income that might be sustained by the Commissioners, by requiring the Dock Company to make up any deficiency in the rates and duties received by them below a certain average amount of such rates and duties, enacted that the company should pay the Commissioners an annual sum to make up any deficiency in their annual income derived from such rates and duties when in any year it should fall below the sum of £1000? I cannot see what difference it can make, whether the sum to be paid by the Dock Company to the Commissioners is a sum with reference to the average amount of the rates and duties, or a sum determined by a certain limit of amount. In both cases the deficiency to be made up is ascertained by a fixed and settled rule, and in both, the income of the Commissioners is the annual

amount of rates and duties made up by the Dock Company, either to the average, or to the £1000. The one-fifth of the sum to be raised by the duties can be no part of the income of the Commissioners, but it is a payment out of the income—originally out of the amount of the rates themselves, and afterwards out of the rates and what comes in aid of them, and represents them—the sums paid by the Dock Company.

Upon the question whether a mandamus will lie in this case, I have no doubt that under the 43 Geo. 3, a duty was cast upon the Commissioners to collect the whole of the rates and duties of which the Prosecutors were to receive their one-fifth, and this duty was continued by the 6 Will. 4, and the 6 & 7 Vict., so as to make it imperative upon them to demand and receive from the Dock Company what is required annually to make up any deficiency in those rates and duties below the sum of £1000; and this statutory duty may be enforced by mandamus.

As to the form of the mandamus, it appears to me that it may be supported upon the ground that it is not to be construed so as necessarily to import a command to institute legal proceedings. The words are not to take the necessary and legal measures and proceedings for *enforcing* and recovering payment, but for obtaining and recovering. The distinction is rather fine, but I think it admits of the construction that the Defendants are merely ordered to take proper measures for obtaining payment, but are not commanded absolutely to bring an action.

I think that the judgment of the Court of Exchequer Chamber ought to be reversed.

LORD COLONSAY entirely concurred.

Judgment of the Court of Exchequer Chamber reversed.

Lords' Journals, 4th April, 1870.

Attorneys for the Plaintiffs: *Stocken & Jupp.*
Attorneys for the Defendants: *Abbott, Jenkins, & Abbott.*

1870
March 8, 10.

JAMES JOSEPH DOLPHIN . . . . . APPELLANT;

AND

J. MICHAEL ANTHONY RICHARD AYLWARD, AND OTHERS . . . . . } RESPONDENTS.

Life Estate—Inheritance—Mortgages—Marshalling.

The statute 27 Eliz. c. 4, against fraudulent conveyances, enables a settlor to defeat a settlement which he has created on behalf of his family, but it only does so upon a subsequent conveyance to a purchaser for actual value. A mortgagee is a purchaser within the meaning of the statute.

Where a voluntary settlement has been made, subsequent judgment creditors of the settlor cannot acquire rights in derogation of it which the settlor himself would not have possessed.

A Court of Equity will not interfere actively against a volunteer through the medium of a person (not a purchaser for value) claiming only through him who has created the voluntary settlement.

Two judgments (one for £1000, the other for £2000) were entered up against *A.* in 1802. They constituted the amounts which *A.* had undertaken to pay his two sisters on their marriages. *A.* married. A few years after his marriage, namely, in 1809, *A.* made a voluntary settlement of his estate (of which he was then the owner in fee), in which settlement there was a recital that *A.'s* estate was subject to incumbrances amounting to £3000, in respect of money settled on his sisters, and to a charge in favour of *A.'s* wife; it then gave the estate to *A.* and his wife for their joint and several lives, and after the death of the survivor to the use of trustees for 300 years, to secure portions for younger children, and, subject to the term, to the use of *A.'s* then eldest born son for life, remainder to his first and other sons in tail male, with a power to the son, when he should come into possession of the life estate, to provide for wife and children. By deeds dated in 1818 and 1819, *A.* executed mortgages on this estate to two different persons. In 1831, by articles of agreement on the marriage of *A.'s* eldest son, the post-nuptial settlement of 1809 was recited; then the mortgages of 1818 and 1819 (the sum secured by that of 1818 was to form the portion of the son's intended wife), and certain provisions were made for the son's wife, and for the children of the intended marriage. During the life of *A.* some of these liabilities were (as it was alleged, and assumed to be proved) paid off out of his life estate; a part of the inheritance also was sold, and applied for a similar purpose. In 1861 he died, and certain persons who had, after the date of this settlement, obtained judgments against him, took proceedings in Chancery to have it declared that the principal of the judgments of 1802, and the mortgages of 1818 and 1819, were incumbrances affecting the inheritance, and ought to be paid out of the inheritance in exoneration of the life estate of *A.*:—

Held, in the Court below, that assuming the fact that some of these

charges had been paid out of the life estate of *A.*, the life estate was, in favour of creditors, entitled to stand credited as against the inheritance for so much of the principal of the judgment of 1802 (the judgment for £2000), as had been paid out of the rents and profits; but accounts were directed as to some charges affecting the life estate alleged to have been satisfied, during *A.'s* life, by the sale of part of the inheritance. This holding was affirmed on appeal.

The doctrine of marshalling declared not to apply to a case like the present.

THIS was an appeal against a decision of the Court of Chancery in *Ireland*, dated the 15th of December, 1853, which had been affirmed by the Court of Appeal there by an order dated the 11th of May, 1864.

Before the year 1802, *John Michael Aylward* was seised in fee of certain lands in the county of *Galway*.

A judgment as of Hilary Term, 1802, for £1000, was recovered by *William Burke* against the said *John Michael Aylward*, as and for the portion of Mrs. *Burke*, formerly *Mary Aylward*, his sister. In a deed of settlement executed in January, 1802, on the marriage of the said *Mary Aylward* with *William Burke*, this judgment was recited.

John Michael Aylward, in April, 1802, executed a bond, with warrant of attorney, to *J. Callanan* and *L. Roche*, as trustees, for confessing judgment for £4000, conditioned for the payment of £2000, with interest, as a marriage portion for another sister, *Barbara*, on her marriage with *William Mahony*. Judgment was entered up thereon in May, 1802 (as of that Easter Term).

Callanan and *Roche* executed a deed declaring that they held this bond in trust to pay the interest to *Mahony* and his wife for their respective lives, and the principal sum to the issue of the marriage.

In 1803 *John Michael Aylward* married *Jane Lambert*, and on occasion of that marriage his lands were put in settlement and were charged with an annuity of £300 for his wife in the event of her surviving him. In March, 1807, he made in her favour a farther annual charge of the same amount.

In December, 1809, a deed was executed between *John Michael Aylward* of the first part, his wife of the second part, *Anthony Lambert* of the third part, and *Richard Morrison* of the fourth

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part, which recited that there were children of the marriage of *J. M. Aylward,* and which then went on to recite the previous transactions thus:—"Whereas *J. M. Aylward* is now seised in fee of the said several estates, subject to the said yearly sum of £600, for the life of his said wife, and subject also to certain charges amounting in the whole to £3000 principal money, with which the said estate stands charged for the use of the sisters of the said *J. M. Aylward,* as expressed in the several marriage settlements of his said sisters." After this recital the deed went on to declare that the said *J. M. Aylward* conveyed the said lands unto *A. Lambert* and his heirs to the use of the said *J. M. Aylward* and his wife for their joint and several lives, and after the death of the survivor to the use of the said *Richard Morrison* for the term of 300 years, to secure portions for younger children, and, subject to the said term, to the use of the said *J. M. Aylward* for life, with remainder to his first and other sons in tail male, remainder to the other sons (if any) of the said *J. M. Aylward* by his said wife, in tail male, remainder to the daughters of the said *J. M. Aylward* by his said wife, and their heirs, as tenants in common, with remainder to the right heirs of *J. M. Aylward;* and the deed gave power to *J. M. Aylward,* when he should come into the possession of the life estate thereby limited to him, to charge the said lands with a jointure for any wife he might marry, and with portions for younger children.

In 1812, *William* and *Barbara Mahony* filed their bill against *J. M. Aylward* and his wife, and *John Michael Anthony Richard Aylward* (their eldest son), and all other necessary parties, for payment of the money, with interest, due under the judgment of Easter Term, 1802, the demand amounting to £2300; a receiver was appointed.

By deed of the 25th of November, 1818, *J. M. Aylward* mortgaged the lands to one *Thomas Higgins* for £2752 and interest.

In May, 1819, one *Michael Aylward* filed his bill in the Court of Chancery against *John Michael Aylward* for payment of a sum of £1000 and interest in respect of a charge affecting the inheritance of the said lands, and by an order of the Court the power of the receiver appointed in *Mahoney's* suit was extended to this new cause.

By deed of the 13th of December, 1819, *John M. Aylward* mortgaged a part of the said lands to *A. A. Nugent*, for £2212.

In January, 1822, *J. C. Hickson* filed his bill against *J. M. Aylward* for payment of several judgment debts due by *J. M. Aylward*, and then vested in *Hickson*, and *Michael Aylward's* claim being afterwards vested in *Hickson*, an order, dated the 28th of November, 1823, was made, by which the receiver in the previous causes was appointed receiver in the cause of *Hickson* v. *Aylward*, in which cause some of the lands were subsequently sold, and payment of the charge was thereby effected.

Dolphin's claim was of a similar sort, and the receivership was likewise extended to that.

In December, 1831, *J. M. A. R. Aylward*, the eldest son of *J. M. Aylward*, married *Mary*, the daughter of *Thomas Higgins* (the mortgagee under the deed of November, 1818), and, on the marriage, articles of agreement were executed which recited the post-nuptial settlement of 1809, and that *Aylward* senior disputed the estate thereby created for his wife, but was desirous to confirm the provisions thereby made for his children, and that *Aylward* senior and his son, in consideration of the marriage portion of *Mary Higgins* (which was the sum secured to her father by the mortgage of November, 1818), and also secured by certain judgments confessed by *Aylward* senior to *Higgins*, covenanted that the limitations of the deed of December, 1809, should stand good and be confirmed, save so far as the same limited any estate to the use of *Aylward* senior's wife, and *J. M. A. R. Aylward* (the son) covenanted that so soon as he became seised of an estate in possession he would exercise the power of jointuring in favour of *Mary Higgins*, his intended wife, to the extent of £500 a year in case of no issue, otherwise £300 a year, to commence at *Aylward* junior's death; and also exercise the power of giving portions to the issue of the marriage to the extent of £6000; and *Aylward* senior covenanted that, in case *Aylward* junior died before him, he would charge the lands with the said jointure. And *Aylward* senior demised the said lands to trustees for a term of ninety-nine years, to secure an annuity of £400 to be paid to *Aylward* junior during the life of himself *Aylward* senior. The articles then, after reciting that the deed of December, 1809, was executed by *John Michael*

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Aylward when he owed nothing, and as such was valid against subsequent creditors, and, as far as his children were concerned, was for a good and meritorious consideration, was yet considered void as against subsequent purchasers for value, and reciting the mortgage of November, 1818, and certain judgments confessed by *Aylward* senior to *Higgins*, and that the sum of £5184 was due on such mortgage and judgments to *Higgins*, assigned the said mortgage and judgments to trustees in trust as to the interest on the £5184, for the use of *Aylward* junior and *Mary Higgins* for their joint and several lives; and as to the principal sum, to the use of the younger children of the intended marriage, and in default of such children to the use of the executors, &c., of *Aylward* junior. And it was provided, that as soon as *Mary Higgins* should get into possession of the jointure which, under the deed of December, 1809, *Aylward* junior was entitled to create in favour of his wife, she should cease to be entitled to the interest of the said sum of £5184, which should then be paid to the person next in remainder entitled to receive the same; and that the younger children were not to be entitled to double portions, namely, the £6000 provided by the deed of December, 1809, and the £5184, but only to the portion amounting in the whole to £6000.

By deed, dated the day next after these articles, *Aylward* senior conveyed the said lands to *Aylward* junior so as to give him an estate in possession by accelerating his life estate under the deed of December, 1809, and thus give him the power of charging the land with jointure and portions; and accordingly *Aylward* junior by deed, dated the 20th of December, 1831, made these charges, and on the very next day reconveyed the lands to *Aylward* senior for his life, subject to these charges.

J. M. Aylward died in September, 1861, and on the 13th of June, 1862, the Appellant, on his own behalf, and on behalf of the other unpaid creditors of *J. M. Aylward*, filed a Cause Petition in the Court of Chancery in *Ireland* against *J. M. A. R. Aylward* (the son) and all other necessary parties, the prayer of which was, that so much of the principal of the judgment of Easter Term, 1802, and of the mortgages of November, 1818, and December, 1819, and of any other incumbrances which affected the inheritance, and was paid out of the life estate of *J. M. Aylward* and should

be necessary to satisfy the demands of the Appellant and the other unpaid creditors whose demands affected the life estate alone, should be raised by a sale of a competent part of the inheritance, and applied in satisfaction of those demands; and for the usual accounts.

The Respondent, *John Michael Anthony Richard Aylward*, put in his answering affidavit on the 12th of August, 1862. He disclaimed all knowledge of the charges referred to in the indenture of December, 1809, as amounting to £3000 for the use of the two sisters of his father, *J. M. Aylward*, and he submitted, as matter of law, whether the lands were put into settlement subject to and charged with the sums of £2000 and £1000, and submitted that, upon the true construction of the settlement of December, 1809, the said *J. M. Aylward* was bound to redeem the lands from, and indemnify them against, the said charges of £2000 and £1000 respectively; that the mortgage of the 13th of December, 1819, was executed for the purpose of farther securing the sums due in respect of certain judgments; that it was by the said mortgage agreed that *A. A. Nugent* should withhold the rent payable by him out of the thereby released premises, and apply the same until his debt should be paid off, but that such retention did not entitle the Appellant, or the other creditors on the life estate, to have the amount of the principal of the mortgage raised out of the inheritance; that even if the deed of December, 1809, was voluntary and void as against subsequent purchasers and mortgagees for value, still that the debts secured by the mortgage of 1818 to *Higgins*, and by that of 1819 to *Nugent*, were the debts of *J. M. Aylward* himself, and that neither he nor his creditors could avail themselves of the fact that the said mortgages were charges on the inheritance, even assuming them to be so. And the Respondent farther stated that by the deeds executed in December, 1831, on occasion of his marriage with *Mary Higgins*, and which were embodied in the marriage contract, the lands, &c., in the Petition mentioned were vested in trust for the purposes of the said marriage, and were so vested without the recognition of any debts or incumbrances affecting the same, save those set forth in the schedule to the said affidavit; that these deeds contained covenants for farther assurance, and that his father could not, nor could the

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creditors on the life estate, sustain any claim or charge against the inheritance of the said lands, nor could they by way of marshalling, or otherwise, stand as creditors against the inheritance to the prejudice of the Respondent, or of other persons deriving under the settlement of 1831. The Respondent averred that in a suit of *Hickson* v. *Aylward* the fee and inheritance of a large portion of the lands had been sold contrary to the rights of the parties claiming under the settlement of 1831, and that large sums, amounting to £4931 2*s*., were paid out of the proceeds of such sale for interest money and costs, and that such sums far exceeded any sum claimable by the Appellant or other creditors against the inheritance. He also set up a counter claim for sums which he alleged to have been paid out of the inheritance in discharge of like sums properly due from the life estate.

The cause (after an amendment made by introducing a representative of the personal estate of *J. M. Aylward*) was heard by the Right Hon. *Maziere Brady*, Lord Chancellor of *Ireland*, who, on the 15th of December, 1863, ordered the Petition to be dismissed with costs. This order was carried before the Court of Appeal, where it was heard on the 11th of May, 1864, by the Lord Chancellor *Brady*, Lord Justice of Appeal *Blackburne*, and Mr. Justice *O'Brien*, when a decree was made which affirmed the order of the Court below, subject to the following variations: "That the Petitioner is entitled to stand as a judgment creditor of the late *J. M. Aylward* for so much of the principal of the judgment of Easter Term, 1802, as has been paid out of the rents and profits of the lands in the Cause Petition mentioned during the life of the said *J. M. Aylward*, as against the inheritance of the said lands, for the benefit of the Petitioner and the other unpaid judgment creditors of the late *J. M. Aylward* whose judgments affected his life estate only; that the inheritance of the said lands is, as against said sum, entitled to credit, and to the right of retainer for so much of the interest upon the charge of £1500 created by certain deeds (specifically mentioned), and now vested in *J. C. Hickson*, the Plaintiff in the cause of *Hickson* v. *Aylward*, as was paid out of the proceeds of the sale of that portion of the estates comprised in the settlement of December, 1809, which were sold in that cause, less by the value of the life estate of the late *J. M. Aylward* in so

much of the proceeds of the lands so sold as was applied to the payment of such interest, such value of said life estate to be ascertained as of the day of such sale;" and the necessary accounts were ordered (1).

This appeal was brought against the original decree of December, 1863, dismissing the suit, and against so much of that of May, 1864, as limited the relief given to the Appellant to his complaint in respect of the judgment of Easter Term, 1802.

Mr. *Lawless*, Q.C., and Mr. *Hyacinthe Plunkett* (both of the Irish Bar), for the Appellant:—

The principle of marshalling applies to this case in consequence of the relative position of the different creditors, and because, otherwise, the sole fund to which some of them are entitled will be taken away. *Averall* v. *Wade* (2) does not impeach the claim of the creditors, which is really affirmed in *Aldrich* v. *Cooper* (3). That case clearly establishes that one man who has different funds to resort to is not to be allowed to work out satisfaction of his claim from any one of those funds to the prejudice of another who has but that particular fund to look to for his security. The deci-

(1) 15 Ir. Ch. Rep. (N. S.) 583. There had been a previous suit, *nom. Stock* v. *Aylward* (Sel. Cas. temp. *Napier*, 378), in which the holding was, that "the judgment creditors of *J. M. A. puisne* to the settlement had no equity to raise, for their benefit, out of the inheritance the amount paid out of this life estate on foot of *B.'s* judgment." When the present case was before the Court of Appeal the right to maintain this suit after the dismissal of the former was contested. The Court held that it was maintainable. The head-note on this point is in these words: "General suit by trustee for all the creditors dismissed on the merits. A particular creditor instituted another suit:—*Held*, that he was not barred by the dismissal of the first." On this point there was no appeal.

(2) Ll. & Goo. temp. Sug. 252. The head-note there printed is: "A party seised of several estates, and indebted by judgment, settles one of the estates for valuable consideration, with a covenant against incumbrances, and subsequently acknowledges other judgments:—*Held*, that the prior judgments should be thrown altogether on the unsettled estates, and that the subsequent judgment creditors had no right to make the settled estate contribute." In Vendors and Purchasers (13th Ed.) c. 23, s. 1, subs. 27, p. 614, Lord *St. Leonards* thus gives his view of what was the effect of his decision in that case: "If there is upon the first sale a declaration or covenant that the estate is free from incumbrances, the first purchaser is entitled to be relieved against the seller and later judgment creditors claiming under him."

(3) 8 Ves. 382.

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sion of the Court below has in this case the effect of defeating that principle. Here the conveyance of 1809 was voluntary, and therefore, under the statute 27 Eliz. c. 4, void as to a purchaser for value: *Roberts* on Conveyancing (1), quoting *Rolle* (2); *Pulvertoft* v. *Pulvertoft* (3); *Buckle* v. *Mitchell* (4). As against a volunteer a judgment creditor must be considered a purchaser for value. The principle that a voluntary settlement is void as against a subsequent purchaser for value was strongly applied in *Daking* v. *Whimper* (5), where it was held that a voluntary settlement of lands being avoided by a subsequent sale for value, the volunteers could have no equity against the purchase-money payable to the settlor. And in *Lomas* v. *Wright* (6) creditors by specialty, who were volunteers, were held not entitled to compete with creditors on simple contract for value, even though, as against the devisees of the debtor, they had a right to stand in the place of mortgagees who had exhausted the fund provided for the payment of the testator's debts. That carried out the same principle in a double form. In *Seton* on Decrees (7) there is a case of *Haylock* v. *Robotham* (8) (not reported elsewhere, but there quoted from the Registrar's minutes), where Vice-Chancellor *Kindersley* held simple contract creditors entitled, as against claimants under a voluntary settlement, to stand in the place of an equitable mortgagee as to principal and interest, so far as he was paid from the general assets (9). The principle of that case exactly

(1) Page 42.
(2) Ibid. 42, n.; 2 Rolle, 35.
(3) 18 Ves. 84.
(4) Ibid. 100.
(5) 26 Beav. 568.
(6) 2 My. & K. 769.
(7) 3rd Ed. p. 315, n.
(8) 4 May, 1861.
(9) The accuracy of this reference in *Seton* having been denied, the entry of the decree has been examined. There appear to have been proceedings first against *Robotham*, and then by revivor against *W. Wade*, who is afterwards specifically mentioned in the decree as the devisee of the copyhold estate of *Robotham*. From the recitals in the minute it appears that there were "due from the estate of the late Plaintiff *Haylock*, on account of his receipts in respect of the personal estate of the testator, *F. J. Robotham*," several sums specifically mentioned. There was a considerable fund in Court, and this was ordered to be augmented by the sale of certain 3 per cent. consols, and payments to many different persons are ordered, together with their costs, which were to be taxed "as between solicitor and client," and among the persons thus named are the bankers Messrs. *Barnetts, Hoare, & Co.* "as equitable mortgagees under the deposit of title deeds."

The decree then goes on thus: "And

applies here. [THE LORD CHANCELLOR suggested a doubt whether the charge of £3000 was sufficiently identified as composed of the two sums of £2000 and £1000, and whether there was sufficient proof of the payment of the two charges out of the life estate.] The statements of the deed of 1809 are sufficient for that identification, although there is no distinct recital of the judgments by name. There is no doubt that they were partly paid off out

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this Court being of opinion that the creditors by simple contract of the said testator are entitled not only in respect of the debts due to them, but also in respect of the interest from the date of the decree in this cause, to stand in the place of *Barnetts & Co.*, the bankers, as equitable mortgagees of the copyhold estate at *Hampstead* surrendered by the said testator in 1819 for the use of himself and the late Defendant *E. S. Robotham*, and since the death of the said testator devised by the said *E. S. Robotham* to the Defendant *William Wade*, to the extent to which the testator's real and personal estate are insufficient for the payment of his debts, and such interest as aforesaid, not exceeding what is due on the security of the said equitable mortgage; and the said *W. Wade* consenting to a sale of the said copyhold estate, and the said bankers, by their counsel, consenting to the other creditors of the said testator being paid out of the fund in Court in priority,—It is Ordered that subsequent interest be computed on the debts mentioned in the first schedule to the Chief Clerk's certificate, &c. And it is Ordered, that out of any cash which shall be remaining on the credit of the first-mentioned cause, after payment of the said costs, what shall be ascertained by affidavit, or certified as aforesaid to be due to the several creditors named in the first schedule, &c. (excepting the bankers), in respect of their debts and costs and interest, be paid to them respectively, or to the legal personal representatives of such of them as may be dead. And it is Ordered that thereout also, in case the same shall be sufficient for that purpose, the amount found due by the Chief Clerk's certificate to the said bankers for their debt, costs, and interest, together with what shall be ascertained to be due to them for subsequent interest, be paid to the said bankers. But if the residue of the said cash, after payment of the said other creditors, shall not be sufficient for payments in full, then It is Ordered that the whole of such residue be paid to the said bankers in payment, in the first place, of such costs and interest, and then in payment, so far as the same will extend, of the principal of their said debt. And the Defendant *W. Wade* submitting thereto, It is Ordered that the deficiency, if any, together with interest thereon at 5 per cent., &c., be raised by the Defendant *W. Wade* by sale or mortgage of the said copyhold hereditaments, &c., held of the manor of *Hampstead*, which were surrendered by the testator to the joint use of himself and *E. S. Robotham*, his wife, since deceased, the title deeds whereof were deposited by the testator with the said bankers as a security for their debt. With liberty to apply, &c."—Fo. 32, Reg. Bk. A. 1861, pp. 1018–1020.

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of the rents and profits of the life estate; and if so, the creditors who have only that estate to look to are entitled to reimbursement. But if there is any doubt as to the fact a farther inquiry ought to be directed. The title of the life estate to be reimbursed for charges improperly paid out of it when the inheritance is really liable for them is shewn very distinctly in the case of *Flood* v. *Digby* (1), where *G. G.*, at the time of his death, was indebted to *D.* upon certain judgments; to obtain payment of which *D.* issued an elegit, and obtained possession of certain property which had belonged to *G. G.*, and had been made by him the subject of a devise for life to *C. G.* There the amount of the principal money levied by *D.* was held to be a charge upon the inheritance, and to form part of the personal estate of *C. G.*

The form of the decree in the Court of Appeal is erroneous. It ought to have been a reversal, and not a mere variation, of that pronounced in the Court below.

The costs, too, ought to have been given to the Appellant, or, at all events, apportioned.

Sir *R. Palmer*, Q.C., Mr. *Christopher Palles*, Q.C., and Mr. *C. P. O'Flaherty* (the last two gentlemen of the Irish Bar), for the Respondents, were not called on.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, this is an appeal from a decision of the Court of Appeal in Chancery in *Ireland*, so far, at least, as it is alleged to be defective in not giving the Appellant (who also represents several different creditors) all that he conceives himself entitled to in the cause. The creditors claim under certain instruments which had been executed by *Aylward* senior, and several judgments which he had suffered in respect of debts due from him to several different persons. The decision in the Court of Appeal in *Ireland* modified the decision of the Lord Chancellor, who had refused entirely any relief on the subject matter of the Cause Petition presented by the Appellant. The Court of Appeal gave relief to the Appellant in respect of a certain judgment debt for a

(1) 1 Jo. Ex. Rep. (Ir.) 520.

sum of £2000, created as long ago as 1802 by *Aylward* senior in favour of one of his sisters.

The narrative of the proceedings may be briefly stated thus:— There were existing two judgment debts in 1802. The one was a judgment debt in favour of one sister, Mrs. *Burke*, the other was a judgment debt in favour of the other sister, Mrs. *Mahony;* the latter being for £2000 (the penal sum being double that amount), and the other being for £1000. Having submitted to these two judgments, *Aylward* senior, father of the present Respondents, executed a voluntary settlement in 1809 of real estate, reserving to himself a life interest. It is not necessary to pursue all the limitations of that settlement. Suffice it to say, that there are persons now before us interested under the settlement, and resisting the Appellant's claim.

The settlement itself recited that the property was liable to incumbrances amounting to £3000, in respect of money due to, and settled on, the settlor's sisters. And in respect of one of these two sums, namely, the sum of £2000 settled on Mrs. *Mahony*, there appears to have been evidence which satisfied the Court of Appeal in Chancery that that sum of £2000 was part of the £3000 referred to in the settlement of 1809. And there was evidence, also, that satisfied the Court that that amount, to which the estates settled by the deed of 1809 were certainly subject, had been paid out of the life interest reserved by the settlement of 1809 to the settlor.

This being so, and the Court being satisfied upon these two heads, relief was given in the Court of Appeal to the present Appellant, who was only an incumbrancer by virtue of the judgment upon the life estate, in respect of the capital sum of £2000, or the portion of it which had been paid out of the fee simple of the estate.

With regard to the other sum of £1000, two points were necessary to be made out. First, it was necessary to prove that that other sum of £1000 was the identical judgment debt of 1802 in favour of Mrs. *Burke;* and, secondly, it was necessary to prove that that debt had been paid out of the life interest of the settlor, in order to place it in the same position as the other debt to Mrs. *Mahony*. The Court was satisfied upon both heads of evidence.

We are now asked to deal with this sum of £1000 in one of two ways; either by taking it to be established upon the evidence

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before us that it stands in the same predicament as Mrs. *Mahony's* debt, or if we are not satisfied upon that head, then to direct an inquiry.

The evidence brought to shew that it stands in the same position as Mrs. *Mahony's* debt is this; that it is stated in the instrument of 1809 itself, that the sum of £3000 constituted the total amount of moneys secured to his two sisters. It is proved that the £2000 due to Mrs. *Mahony* formed part of that sum of £3000. It is proved that there was a settlement, with a judgment debt of £1000, in favour of Mrs. *Burke*. And it is argued with some degree of cogency that there is considerable ground in that state of things for saying that this sum of £1000 was, in truth, the other judgment debt created on behalf of the other sister. But, assuming that to be so, how do we find that that debt has been paid out of the life interest? As to that, the evidence is an absolute blank. The only attempt to shew it was this: It was very ingeniously argued by the learned Counsel who has addressed us to-day, that it is stated in the Respondent's case that the debt of 1802—the debt of £1000—was paid off before the present Appellant acquired any interest at all in the property; and from another part of the Respondent's case is elicited this statement, that the Appellant had no interest in the property in 1829. It is said, therefore, that as no sale of the fee simple took place till 1831, it cannot have been paid out of sales of the *corpus*. And therefore (and here is a large step made in assumption), it is to be assumed that it was paid out of the life interest. Now, the fact whether it was or was not paid out of the life interest is a matter capable of easy and simple proof. The documents appear to be extant. The receiver's account, by which it could be ascertained what had or had not been paid out of the life interest, is in existence; and it is undoubtedly incumbent on the Appellant to establish the fact that it has been paid out of the life interest. The onus of proof is thrown on him, and he has not discharged it. It must be for one of two reasons, either that the receiver's accounts are so defective that it cannot be ascertained, or that these accounts having been looked at and not being defective, it is found that they contain no history whatever of the payment of the sum in question.

My Lords, that being so, there are two grounds on which this

House should not now direct a farther inquiry. The case has been pending for a considerable time. The litigation has been prolonged and extensive. The sources of evidence have been ransacked, and no evidence appears to be produced. Then why are we to assume that any longer time is necessary for making any such inquiry?

Again, it does not appear that any inquiry of this kind was asked for at the original hearing. In that state of things it does not appear to me that we are bound to direct any farther inquiry, or to prolong a litigation which has been already sufficiently extended.

Then, my Lords, that being so with respect to the judgment debt of £1000, the only question that remains is, what should be done with reference to the controversy which has arisen between the Appellant and the Respondent with regard to the payment of the two other mortgage debts, the one to Mr. *Higgins*, in 1818, and the other to Mr. *Nugent*, in 1819; whether they also are to be paid out of the life interest.

Now, as to both of those debts it appears to me that they stand in exactly the same position. The settlor, in 1809, did refer undoubtedly, to the existing charge of £3000; but whatever effect may have been given to that recital with respect to the sum of £3000 thereby expressly mentioned, of course it can have no application to debts which were created subsequently to the voluntary settlement. The voluntary settlement gave rights to those in whose behalf estates were created in remainder after the life of the settlor, which could only be displaced by the settlor conveying for valuable consideration the same estates to others who would take as purchasers, whether it were an out and out purchase, or whether it were a mortgage. By virtue of the Statute of *Elizabeth*, he, the settlor, was enabled to defeat the settlement which he had created on behalf of his family, so far as the mortgages extended. Not on account of any favour shewn to him, nor because the deed itself, of 1809, was, as to him, invalid. On the contrary, he could in no wise invalidate the deed except by creating such an interest in others. And on behalf of the mortgagor or purchaser the statute intervenes, and says, that as to any purchaser the deed shall be invalidated to the extent of the interest of that purchaser. It

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leaves all those who were interested under the voluntary settlement in exactly the same position in which they were originally placed when the settlement was executed, except that they are displaced to the extent to which the mortgage displaces them. Accordingly, therefore, the mortgages of 1818 and of 1819 charged the whole estate, and subjected those who were interested in the voluntary settlement to the necessity of submitting to a corresponding amount of loss in respect of the interest which had been granted them by that deed.

After that the present Appellant acquires an interest by virtue of a judgment. And it is quite settled that a judgment creditor can take no interest whatever, either legal or equitable, beyond what he acquires from the debtor; such an interest, in fact, as the debtor himself could give, and no other. Therefore, finding what is due on his judgment debt, he proceeds by elegit to enforce its recovery, and he takes the interest of his debtor in exactly the plight in which he finds it. Now, in what plight did he find it? He found it in this condition, that the settlor had conveyed these estates by way of a voluntary settlement, reserving to himself only a life interest. For though he had created, on behalf of the mortgagees for the debts of 1818 and 1819, a larger interest to the extent of their debt in the estate subjected to the settlement, yet as regards the judgment creditor, that creditor had only the life interest of his debtor to look to, and he could claim no part or share whatsoever in the reversion of the estate, which was vested under the voluntary settlement.

But then, he says, True it is, this I must submit to, and I have no interest whatever granted to me by which I can assail or molest those who are enjoying the benefit of the voluntary settlement subject to my life interest,—but although that be so, we must look upon this state of things as one which raises the doctrine of marshalling, and inasmuch as there are certain mortgage creditors who are mortgagees upon the whole estate, the life estate and the reversion, and we are only interested as incumbrancers upon the life estate, let the Court tell those mortgagees that they shall seek their payment out of the reversion only, they having the two funds, and we having only the one, and let them leave us the life interest unaffected by their incumbrances, inasmuch as there are sufficient assets to pay us

both. In other words, supposing this doctrine of marshalling could be applied to an estate circumstanced as this estate is, they say: We are bound to admit that it would be impossible for us to assail directly the interest of those who are entitled under the voluntary settlement; but by the doctrine of marshalling we may throw others upon that estate which we could not assail, because our judgment debtor could not assail it. We may insist upon their estate in effect having thrown upon it not only the burden created by the mortgages as against them, through the medium of the settlement, but also the burden of our judgment debt, which we insist shall be in this manner paid by the amount of the mortgage debt being recovered against the whole estate of the settlor.

Now I apprehend, even if this were a distinct and clear case of marshalling (upon which I shall have a word to say presently), if the case stood thus (a case which I ventured to put during the argument), that a person having three estates, which we will call *A.*, *B.*, and *C.*, with mortgages upon all the three, executes a voluntary settlement of one of the estates, say of *C.*, and afterwards creates a mortgage upon *B.* alone, I apprehend that he cannot, according to the doctrine laid down by Lord *Eldon* in *Aldrich* v. *Cooper* (1), affect the interests created in third parties by this doctrine of marshalling, that is to say, he cannot throw the mortgagees of *A.*, *B.*, and *C.* upon the estate conveyed away by voluntary settlement, in order that he may leave *B.* entirely clear and free from mortgage debt. He would by that means, as I venture to think, be adopting a course precisely contrary to what is laid down by Lord *Eldon*.

But the learned counsel urged that this is not an interest created for value, and that as against volunteers this right of marshalling will prevail. Now, with the exception of that case which came before Vice-Chancellor *Kindersley*, of which we have not all the facts precisely before us, although they have been a little more clearly explained this morning by Sir *Roundell Palmer* after his investigation of the matter, I really know of no case which seems to countenance the proposition that you can as against volunteers acquire a right in any way to affect them which your judgment

(1) 8 Ves. 382.

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debtor, whose interests you hold, would not have been at liberty himself to assert. You are not entitled indirectly to effect that which you could not do directly, and the rule laid down by Lord *Eldon* in *Aldrich* v. *Cooper* (1), namely, that the doctrine of marshalling shall not be applied to prejudice third parties, has a distinct and clear application in this case, because the volunteers are in this position; they have intermediate rights, and though you cannot interfere to prevent him who has created the voluntary settlement from displacing them by a sale, because it is a doctrine of the Court of Equity that it will not interfere on behalf of a volunteer, yet at the same time that doctrine is not carried to this extent, that the Court will interfere actively against a volunteer through the medium of a person claiming only through him who created the voluntary settlement. There is one case cited in the books in which there was an attempt made (it certainly is surprising that the attempt should have been made, but the attempt was made) by a person who was tied up by a voluntary settlement to have it cancelled. The attempt necessarily failed, because the Court will no more actively interfere against a volunteer than it will act for a volunteer when it is called upon to do so by the person who made the voluntary disposition.

I said that I would say a word with regard to the peculiar circumstances of this case, in which the doctrine of marshalling is attempted to be put forward. The marshalling which is contended for consists in this, that there being a whole fee simple subject to a mortgage, and the person possessed of the fee simple having afterwards reduced himself to a life interest in that estate, we are called upon to marshal the two interests in the same way as if there were two or three different estates which had been dealt with by a security being created upon one on behalf of a second incumbrancer as against the mortgagor, who has also created an incumbrance upon that and the two other estates in behalf of the same original incumbrancer. I confess that if the case ever has to be dealt with, it appears to me that considerable difficulties may arise with respect to property so circumstanced, regard being had to this, that a security on a life estate is one which is accruing, and not one that can be immediately dealt with; it is one that is

(1) 8 Ves. 382.

accruing *de anno in annum* as long as the person who has the life estate is living; it cannot be distinctly measured until the life itself has determined. For all I know, when the matter comes to be fully investigated there may be ways and means of arriving at the application of the doctrine of marshalling in such a case; but I do not think that the present case makes it necessary to enter upon the discussion of that question. I think it comes simply to this: that if you regard it as a claim in respect to marshalling three separate estates, you cannot, as against the volunteers on behalf of the judgment creditor claiming under him who created the voluntary settlement, so marshal the whole estate as to throw the *onus* upon the volunteers. In other words, you must put the judgment creditor in exactly the same position in which his judgment debtor stood, and I think we can go no higher than that. He has had conceded, as far as it goes, all the rights which the debtor himself acquired, namely, of throwing upon the *corpus* that which the Court held that he had a right to throw upon the *corpus* in exoneration of his life interest. But beyond that, it appears to me that the Court was perfectly right in saying that the Appellant was not entitled to relief.

I do not think there is any other point to which I need advert, except it be one of those somewhat peculiar and mystical points which have been discussed, as to which I confess, although the learned Counsel argued the point with great clearness, still they could not dispel the haze of doubt which existed in my own mind during that portion of the argument with regard to the second point, namely, as to what should be done with respect to certain allowances and rebates which were made in respect of the payment of interest, which they said ought to have been made in respect of the life interest and of certain costs. It comes to this, that they would have been better off if the costs had not been paid so soon; and the costs being paid, the persons interested in the life estate and the reversion were distinctly obliged to share the loss which occurred, as the one party got a share of the reversion, and the other a share of the life interest. The litigation being on behalf of all, each person had to suffer that loss which his interest in the estate required.

With regard to the alleged defect in the form of the decree, I

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think that there is nothing at all calling upon the House to make any change in the decree in that respect. Upon the whole, therefore, I would suggest to your Lordships that the decree of the Court below should be affirmed, and that the appeal should be dismissed with costs.

LORD CHELMSFORD concurred.

LORD WESTBURY:—

My Lords, I might well take the same course with my learned friend, but out of respect to the argument at the Bar I will say a few words. The Petitioner, the Appellant here, claims, first, in respect of the debts existing at the date of the settlement of 1809. It appears that the estate was charged with an old debt in 1783 in favour of one *Hickson*, and then it appears that the owner of the fee simple charged it with two judgment debts (for which he also gave bonds), being portions which he had advanced to his two sisters. Subsequently he made a voluntary settlement in 1809, and the fact of the existence of debts, the portions of the sisters, is recited in that settlement. The conveyance is not made subject to the debts, save as it may be collected from the recital, nor is any contract taken that the land shall be the primary or the sole fund for the payment of these debts as between the obligor in the bond, the settlor, and the party entitled under the settlement.

Subsequently to this settlement the tenant for life made two mortgages, one, in 1818, to Mr. *Higgins*, and one, in 1819, to Mr. *Nugent*. Those mortgages, but for the statute against fraudulent conveyances, would have affected only his life estate, but by the operation of that statute they stand thus,—they are made charges upon the entirety of the estate conveyed by the settlor in the deed of 1809, and the voluntary settlement of 1809 takes effect only on the property remaining subject to those two mortgages, and subject, of course, to the prior judgment. What may be the rights of the parties entitled under the voluntary settlement against the settlor, who has thus defeated his settlement by the aid of the statute against fraudulent conveyances, I do not stop to inquire, because it is sufficient to say that after he had done this he con-

fessed the judgment debt, or a judgment debt was recovered against him, the title to which is now vested in the present Appellant.

What is the operation of that judgment debt? It affected only the interest which *James Michael Aylward* held in the lands, that is, the residue of his life estate after satisfaction of the incumbrances. The judgment creditor stands in the position of an assignee of the life estate of *James Michael Aylward*. And the contention on his part is this, that he (that is, *James Michael Aylward*) had a right to confine the two mortgagees, *Higgins* and *Nugent*, to the incumbrances of the estate comprised in the settlement, leaving free from those mortgages the life estate of *James Michael Aylward*.

It is preposterous to suppose that any such claim could be made by *James Michael Aylward* himself. He, instead of having a right to throw these charges upon the inheritance, might more fairly be called upon to exonerate the inheritance from those charges. It is impossible, therefore, to contend for a moment that *James Michael Aylward*, or his judgment creditor, could make any such claim as against parties interested under the voluntary settlement. It is quite a mistake to apply the doctrine of marshalling to a case of this nature. The doctrine of marshalling is no more than this, that where one person has a clear right to resort to two funds, and another person has a right to resort to one only of these two funds, the latter may say that, as between himself and the double creditor, that double creditor shall be put to exhaust the security upon which the single creditor (if I may so call him) has no claim. But it would be utterly impossible to apply that doctrine to a case where the single creditor is in truth himself bound to the party entitled to the other security.

Upon these grounds, my Lords, without entering into the particular merits of the judgment, being rather surprised to find that the Appellant has been so fortunate as to have got so much, for which, however, we must assume that there were sufficient grounds, I am clearly of opinion that the Court below has rightly dismissed this appeal. With regard to the costs, if there be anything in the grounds now set forth, they should have been brought forward at the time when the order for costs was made; but it is impossible now to deal with that order, or to apportion the costs in any man-

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ner. If it was right that they should have been apportioned, and they could have been apportioned, they ought to have been apportioned at the time when the order for costs was made.

LORD COLONSAY concurred.

Judgment affirmed, and appeal dismissed, with costs.

Lords' Journals, March 10, 1870.

Solicitors for the Appellant: Messrs. *Uptons, Johnson, & Upton.*
Solicitor for the Respondent: Mr. *T. Baker.*

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MARGARET MAXWELL AND OTHERS (INFANTS) . . . . . } APPELLANTS;

AND

MAXWELL HYSLOP MAXWELL AND OTHERS RESPONDENTS.

Will—English and Foreign Estate—"All my just Debts"—Costs.

13 Eq 223,

The expression in a will "all my just debts" includes all the testator's debts whenever and wherever contracted, and therefore includes a debt contracted by him after the making of the will, and contracted in a country other than that of his domicil, and secured upon property situated in that other country.

The burden of shewing that the words have a less extensive meaning lies on him who asserts their restricted operation.

A Scotchman domiciled in *England* had a Scotch estate, *G.*, he made a "trust disposition and settlement," in the Scotch form, of this estate, creating thereby certain charges upon it, and giving it, subject to those charges, to his eldest son. A Scotch "trust disposition and settlement" is equivalent to an English will, and three years afterwards he made a codicil to it, revoking one of the charges. He was possessed of considerable property in *England* as well as of this estate in *Scotland*, and shortly after making this codicil he made an English will, declaring it to be his last will "as to all property real or personal" of which he was capable of disposing by English law. He declared that the provisions of this will were not in any manner to affect the *G.* estate, or to put to election persons who might be entitled both under the trust disposition and under the will. He directed the trustees under his will to sell, &c., "all the residuary real and personal estate," and out of the moneys which should come to their hands by virtue of the residuary devise and bequest "to pay and discharge all my just debts, funeral and testamentary expenses," &c. He became entitled to the interest for his own life of a sum

of money which was afterwards to go to his children; he induced the trustees of that money to let him have the money itself on his executing to them, in the Scotch form, a heritable bond, which, by the law of *Scotland*, made the Scotch estate, *G.*, a security for the amount:—

Held, that this sum so borrowed from the trustees, and secured by heritable bond on the estate of *G.*, was a "debt" within the meaning of the direction to pay all the testator's just debts contained in the English will; and that, consequently, the residuary personal estate of the testator was liable to discharge it in exoneration of the Scotch real estate of *G.*

As the testator had himself been the occasion of the difficulty in carrying the will into effect, and as this was an administration suit, the costs were ordered to come out of the fund.

THIS was an appeal against a decision of Vice-Chancellor *Malins*. *George Maxwell*, the grandfather of these Appellants, executed, on the marriage of his son, *Wellwood Maxwell*, a bond of annuity for £400 in the Scotch form, dated the 6th of November, 1855, by which he bound himself to pay a sum of £400 a year to the intended wife for her life, and secured it upon an estate in *Scotland* called *Glenlee*. *George Maxwell* died in 1858 possessed of considerable personal estate in *England*, and of this estate of *Glenlee*. After his death *Wellwood Maxwell* entered into possession of these properties.

On the 26th of February, 1859, *Wellwood Maxwell* and his wife executed, at *Liverpool*, but according to Scotch forms, a trust disposition and settlement of the *Glenlee* estate, by which was secured to the wife possession of *Glenlee*, and of the rents and profits thereof, for life, remainder to the eldest and second sons in certain proportions. Charges on the estate were also thereby created for the benefit of their younger children.

In this "trust disposition and settlement" *Wellwood Maxwell* had given his eldest daughter a charge of £200 on his *Glenlee* estate (the rental of which was £2000 a year); but on the 21st of May, 1862, by what was called a codicil to this trust disposition, he revoked it, describing it in the codicil "as a real lien and burden of payment." In all other respects he confirmed the trust disposition and settlement.

On the 26th of May, 1862, *Wellwood Maxwell*, being at that time domiciled in *England*, executed in *London*, and in the English form, a will, in which he recited the "trust disposition and settlement, subject to revocation, according to the law of *Scotland*," of

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his mansion-house, &c., at *Glenlee;* and he declared that "the devises, bequests, and provisions of this my will shall be construed and take effect so as not in any measure to affect my said *Glenlee* estate, or the trust disposition and settlement thereof, or to put to his, her, or their election any person or persons who may claim both under such trust disposition and settlement, and under this my will." He then appointed trustees, bequeathed certain pecuniary legacies, gave directions as to his house, &c., in *Liverpool,* directed that all the furniture, plate, &c., at his *Glenlee* estate should be vested in trustees on trust for the use and benefit of the person entitled under the trust disposition and settlement to the estate itself, with power to the trustees to sell such parts of the *Glenlee* (perishable) chattels as they might deem desirable; and directed that "the net proceeds arising from any such sale shall go and be applied upon the trusts hereinafter declared concerning my residuary personal estate." And as to the "residue of my real and personal estate," including all that he might be able to dispose of by this will, he gave it to the trustees "upon trust, &c., to sell, call in, and convert into money, all the said residuary real and personal estate; and out of the moneys which shall come to their hands by virtue of the aforesaid residuary devise and bequest, and of the trusts relative thereto, to pay and discharge all my just debts and legacies, and to invest the residue of the moneys" in the stocks. He directed a division of this residue into shares, giving to his eldest son the largest share, and the will finished with a declaration that the 23 & 24 Vict. c. 145, should be applicable to, and be taken as part of, his will.

Wellwood Maxwell became entitled to a life interest in a sum of above £14,000, the benefit of which was to go to his children after his death. He desired to borrow the sum itself, and the trustees of it consented to lend it to him on his giving sufficient security. Accordingly, on the 2nd of October, 1862, *Wellwood Maxwell* executed at *Glenlee*, and in the Scotch form, a heritable bond and disposition, in which he recited that he had borrowed of the trustees of Miss *Mary Wight Clark* the sum of £14,143 0*s.* 8*d.*, and he obliged himself, and his "heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order," to repay the said trustees this sum with interest, "and, in

security of the personal obligation before written, I dispone to and in favour of" the said trustees "all the lands of *Glenlee*" (which were very minutely described), "in real security," to the trustees; and he assigned the rents of the lands, but reserved a power of redemption, and in default of payment he granted a power of sale.

This "bond and disposition" in security was duly registered within two days afterwards in the "Registry of Sasines" at *Dumfries*.

Wellwood Maxwell died on the 12th of July, 1866, leaving seven children him surviving. He had not done anything to revoke any of these instruments. The property left was ample to satisfy all the requirements of the will, the personal property alone being estimated at above £100,000, and the only question was, out of what fund certain of the liabilities were to be satisfied.

In March, 1867, a bill was filed in the Court of Chancery which set forth the above facts, and prayed that it might be declared that the said sum of £14,143 0*s.* 8*d.*, with interest, was payable out of the residuary real and personal estate of the testator. The different Defendants appeared and put in answers, and the cause came on for hearing before the Vice-Chancellor *Malins*, who, on the 16th of March, 1867, made his decree declaring that the said sum was primarily payable out of the residuary real and personal estate of *Wellwood Maxwell*, in exoneration of the hereditaments comprised in the heritable bond of the 2nd of October, 1862 (1). This was an appeal against that decree.

Mr. *E. K. Karslake*, Q.C., and Mr. *Neish*, for the Appellants, the younger children:—

The mortgage debt here was a debt expressly secured upon the *Glenlee* estate; in no way whatever was it directly charged upon the English property. It cannot be so charged by mere implication. The two properties are distinct. Though the personal estate of a Scotchman who dies domiciled in *England* must follow the law of the domicil, his real estate is not so affected either with respect to rights or liabilities. Therefore in such a case the heir of the deceased succeeding to a Scotch estate which was mort-

(1) Law Rep. 4 Eq. 407.

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gaged, he being at the same time next of kin of the deceased, and as such entitled to a share of the personal funds in *England*, was held not entitled to come on the personal funds in this country in exoneration of the payment he had made out of the Scotch estate to satisfy the Scotch mortgage: *Drummond* v. *Drummond* (1). Sir *W. Grant*, in *Brodie* v. *Barry* (2), referred to and acted upon that case, and one of a similar nature, *Balfour* v. *Scott* (3), declaring that a Scotch estate thus charged with a heritable bond was, by the law of *Scotland*, the fund from which that charge was primarily to be satisfied. In both these cases there had been an intestacy, and what the common law was then, the law under *Locke King's Act* (17 & 18 Vict. c. 113) is now. Unless there is an intention to exonerate the real estate it must bear the burdens which have been fixed upon it.

The trust in the will for the payment of debts comes after every disposition relating to the Scotch real estate, and does not in any way refer to that estate. By Scotch law the real estate is primarily liable to the debt secured by the heritable bond: *Erskine's* Institutes (4), where it is said, "The law itself has divided succession into two branches—the heritable and the moveable; and as each of these ought to bear the burdens which naturally attend it, the heir is the proper debtor in heritable debts, because he succeeds to all the subjects on which those debts are secured." It is impossible, therefore, to say that by mere implication, and without any expression of intention to that effect, the Scotch mortgage must be cast upon the English personalty. Nor can it be contended that a heritable bond, which is a peculiar security of the law of *Scotland*, affixing a special liability on land in *Scotland*, can be properly included under the general word "debts" in an English will. In order so to treat it there must be a positive declaration of intention on the part of the testator.

There is no such declaration here. Besides, in this will there is a devise of real and personal estate made without reference to the *Glenlee* estate, and made in a particular manner, so as to shew that it relates only to English property; and then there is the farther declaration that nothing contained in the will shall affect the

(1) 6 Bro. P. C. 601.
(2) 2 Ves. & B. 127, 132.
(3) 6 Bro. P. C. 550.
(4) Bk. III. tit. ix. s. 48.

Glenlee estate. So far is this carried, that there is an express provision that the person who succeeds to the *Glenlee* estate, if he is a person to be also benefited under the English will, shall not be put to election. In every way, therefore, did the testator separate the two properties, and keep them distinct from each other. They must bear their own distinct and separate burdens, and them alone. The more the details of the will are looked at, the more plain does it become that he had no intention of blending, but had every intention of separating his English from his Scotch property; and he speaks of intending to dispose of his English property according to English law.

The Scotch trust disposition is ambulatory in the same manner as is an English will, which, in fact, it exactly resembles, and there was one charge on his Scotch estate in it made in favour of his eldest daughter. This charge he did, and expressly, recall, doing it, not indeed by his English will, but by a codicil to his Scotch trust disposition. The other charge, the mortgage debt, he knew of, but he did not say a word as to that. It is clear, therefore, that he meant that charge to continue as originally constituted. To hold that the personal estate in *England* is to exonerate this real estate in *Scotland* from a charge specially fixed upon the latter, will, therefore, be to defeat the testator's intention to provide for his younger children, and will give an additional benefit to the son, for whom he had already made ample provision. *Mellish* v. *Valins* (1) does not affect this case, and the observations there made on Lord Chancellor *Campbell's* words in *Woolstencroft* v. *Woolstencroft* (2) have no bearing on this question, except so far as they tend to shew that a double declaration of intention is not required to be shewn in order to bring the case within the statute. Observations to the same effect were made by Lord Justice *Turner* in *Eno* v. *Tatham* (3); but in both instances the principle was recognised that the words of the will were to be looked at in order to obtain the intention of the testator. That being the principle, the words here leave no doubt that this testator entertained no intention whatever to make his Scotch heritable debt a charge on his English personalty.

(1) 2 J. & H. 194. (2) 2 De G. F. & J. 347.
(3) 3 De G. J. & S. 443.

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Mr. *Anderson*, Q.C., Mr. *Osborne*, Q.C., Mr. *Dickinson*, Q.C., Mr. *Wickens*, Mr. *Haddan*, Mr. *Appach*, and Mr. *Stallard*, for the other parties, were not called on.

THE LORD CHANCELLOR (Lord *Hatherley*) :—

My Lords, we are called upon, on the present occasion, to reverse a decision of the Vice-Chancellor *Malins* upon the construction of a will of Mr. *Maxwell*, a Scotchman domiciled in *England*—a will in the English form, and to be construed, undoubtedly, by us as an English will. The true question to be considered, therefore, is, what is the effect of the disposition made by the testator, and what is the true intent of his will to be collected from that instrument?

Now, in order to arrive at any conclusion as to his intent, we must, of course, know the circumstances under which the will was executed with reference to the position of his property as it existed at the time of his making his will. The circumstances of his property were these :—He had an estate in *Scotland*. He had made an instrument—which I may, perhaps, for the particular purpose of this decision, call a testamentary instrument—with reference to that property. It was an instrument, at all events, which was ambulatory, which was revocable, and which he could vary from time to time during his life. In that instrument he had made a particular disposition or settlement of his Scotch property. He had given the bulk of the estate, subject to a certain provision for his wife, to his eldest son ; he had given some portion of his estate to his second son ; and he had made other provisions with regard to the rest of the estate. That being so, he proceeded to make his will, having, a few days before, executed an instrument which he called a "codicil," by which he revoked an annuity he had previously given by the trust disposition.

Now this will refers manifestly, in words, to the arrangements which he had made with regard to the Scotch property. It commences by stating that he revokes his former will, which had been executed as to his English property, declaring it to be his last will that all property, real or personal, which he was capable of dealing with should be dealt with according to the formalities of the English law. Then he recites the state of his family, namely, that he had a wife, four sons, and two daughters, all of whom were infants ;

and then comes the important recital that he had executed a trust disposition and settlement, subject to revocation, according to the law of *Scotland*, of the property at *Glenlee;* and he expressly declared that the devises and provisions of his will should be construed so as not in any manner to affect his *Glenlee* estate, or the trust disposition and settlement, or to put any person claiming both under the trust disposition and settlement and the will to an election. I apprehend that the true construction of that declaration is, that he intends that nothing afterwards stated in his will shall affect any previous disposition which he had made and which he had recited with regard to his *Glenlee* estate, or put any person to his election who may claim under the will which he is now making in *England*, and also under his trust disposition of the estate in *Scotland*, and that he uses these phrases for the express purpose of avoiding questions which have arisen from time to time with reference to the doctrine of election, and which, in some cases, fell to be determined under circumstances of considerable difficulty, owing to the conflict occasionally occurring between the law which regulates real estate in one country and in the other. He wishes to avoid all doubt as to questions of that character, and therefore he introduces these words.

I will consider presently, when we come to the subsequent facts, how far the circumstances of his noticing that the instrument is revocable, and the circumstance of his using the phraseology which he has here adopted, indicated an intention that the words he has used, and the proviso he has introduced, are to be construed with reference to whatever might be the exact state of the settlement of his *Glenlee* estate at the time of his death, he having power to alter and revoke, as he has told you, the disposition of his estate; and how far this construction, if so extended to the state of his property at his death, would affect the question we are now called upon to decide with reference to the very large debt contracted subsequently to the execution of his will. The latter part of the will may be very simply disposed of by saying that he bequeaths certain other estates, and bequeaths certain other properties, to his executors and trustees, and directs a sale of them; and he desires that the proceeds of the property sold shall be carried to one common fund, and that that fund shall be applied to the pay-

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ment of his debts. That, according to the construction of an English will, would be an express direction to his trustees to pay out of that fund all the debts that may be due and owing by him at the date of his decease.

What afterwards takes place is this; he has, under the will of a relative, a right to a life interest in a large sum of money—a sum of £14,000 odd, with benefit of remainder to all the children of the family. Well, that property is vested in certain trustees, of whom I think he was himself one; but, at all events, he, being the owner of the life interest, was desirous of having the control of the fund, and he appears to have made arrangements with his co-trustees, by which they, (being satisfied with the security he had to offer, and satisfied of his solvency in general,) were content to let him take into his possession the whole of this sum of £14,000, taking by way of security from him a heritable bond, by which he bound himself, his heirs and executors, without the necessity (as is expressed in the bond) of discussion between what we should call his real and his personal representatives; and he farther expressly charges the *Glenlee* estate with this bond.

That being so, the question is now shortly and simply this, whether or not the direction to pay all his debts in the first place included this particular debt? As to that, in itself, there could be, I should think, very little doubt or difficulty. I will consider presently the effect of the proviso in the will, but, independently of that proviso in the will as affecting the *Glenlee* estate, we have not a case like that of *Drummond* v. *Drummond* (1), in which, there being a charge upon landed estates in *Scotland*, which was a debt of an intestate, and there being also personal property of the intestate, the property of the intestate being administered according to the English law (for *England* was the domicil of the intestate in that case), the Court held that where the person himself, the *præpositus*, had expressed no intention, but had left the property to be disposed of according as the law might direct as affecting his two classes of property, the law would apply the real estate according to the existing law in *Scotland*. That would involve the necessity of the Scotch creditor taking his remedy out of the Scotch estate, and the necessity, therefore, of the heir to the Scotch estate

(1) 6 Bro. P. C. 601.

bearing that burden; and the consequence would be, that the person entitled to the personal estate in *England* would not be liable to bear that charge, which would be primarily a charge upon the Scotch estate.

But here we are dealing with the testator's intention as expressed in the will. That intention expressed in the will is, that the whole of his debts should be paid out of the fund which he has indicated for that purpose in his will, independently, as I say, of that particular provision which is found in the will. Now I revert to that provision and the question is, whether or not the circumstance that he and his family were, in effect, holders of a fund of £14,000, which he had been minded to take into his own possession, his co-trustees having assented thereto; and he knowing that by his very will itself (for that is the case here) he had made due and ample provision for the payment of all his debts, whether, under those circumstances, he has so expressed his will and intention as to make the debt payable out of his general estate. He had taken the money into his own hands, made himself debtor for this amount, and provided that this sum should be secured both through the medium of his executors and through the medium of a charge upon his Scotch estate, as indicated by the words which occur in the first portion of his will, and now we have to decide whether he has, in the special proviso, so expressed his intent and meaning that any particular debt on coming into existence afterwards, which might affect by way of charge his Scotch property, should not be dealt with in any manner by his will, or whether we are to construe this will in what appears to me the more rational way of construing it. The estate might have farther and other dispositions impressed upon it at the time of his death. He might have changed his mind, of course, with regard to the disposition of that estate amongst the different members of his family. He might have given it to his daughters instead of to his sons, or he might have given it to his second son instead of to his eldest son, or the like; but he says, "Nothing in this my will is to interfere with it."

But now, as a question of construction, can that be rationally (by "rationally" I mean having due regard to the rules relating to the construction of an instrument of this kind) extended to a

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case of this description, not with any limitation, not with the power of revocation which he has impressed upon the *Glenlee* estate, but in a state of things in which, having taken the trust fund for the benefit of his family into his own possession, and by way of security having charged that trust fund not only as a debt payable by his executors, but also upon the *Glenlee* estate itself, and having at the same time, before he so acted, taken care to provide by his English will (which is to be construed according to the English law) for the payment of all his debts, those words are to have an effect attributed to them which amounts to saying, "I declare that I do not intend my trust disposition, or any disposition of *Glenlee*, to be affected by my will?" And yet the construction which we are asked to give to it is such, that we should, in reality, by exempting the English property from the payment of this debt, be making the testator throw upon the *Glenlee* estate a burden which he has not thrown in any way upon the estate; we should be altering and changing the regulations and provisions which he had made for the descent of that estate. He has thrown upon the estate the burden of this debt by way of security, and to provide for the safety of that fund, which was duly intended for the benefit of himself for life, with remainder to his children, and which, by means of the security of this heritable bond, he took care should be in the same state and condition at the time of his death, and be applicable to the purposes for which it was originally intended. In other words, it appears to me, that the creation of the debt, as thrown upon the *Glenlee* estate, does not fall in any way whatever within the true intent and meaning of the provision that the will was not to affect the *Glenlee* estate. All that was done was simply providing a security for the replacing of that money which he had taken into his own possession, and to apply the clause at the beginning of the will as to an exemption of a debt charged on the *Glenlee* estate in the manner prescribed in the general provisions of the will with regard to the payment of his debts, would be distinctly to operate upon the intention of the testator in a manner the very reverse of that which the whole natural sense and construction of the instrument itself indicate to be its true intent and meaning.

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It appears to me, therefore, that the opinion of the Vice-Chancellor is perfectly correct, and that this decree ought to be affirmed, and the appeal dismissed. But this being the construction of a will by a testator who may be said, possibly, to have created, in some degree, the difficulty, by the language which he has used, and, moreover, it being the distribution of an estate among the different members of a family, and not being a case in which any one class of persons is contending in a hostile manner against another class, I think it may be proper that the costs should not be (according to the general rule of your Lordships' House) paid by the Appellant in the case, but that they should come out of the fund. In all other respects it appears to me right and proper that the Appellant should be held to have failed in the application which he has made to your Lordships.

LORD WESTBURY:—

My Lords, this case is one of some nicety; but I think it is reasonably clear, both in point of strict law and justice. The first point is this, which I think can hardly be disputed, namely, that the provision or direction by which the testator gives his general residue, including therein his residuary real estate, which the trustees are to convert into money and out of the proceeds to "pay and discharge all my just debts and funeral and testamentary expenses," includes all his debts whenever contracted; the debts following the personalty according to the quaint expression "*inhærent ossibus debitoris.*" Whether the debt be regarded as an English debt contracted in *England,* or whether it be regarded as a Scotch debt with reference to the Scotch estate, it equally falls within the compass and meaning of the words "all my just debts" contained in that provision. The obligation, therefore, lies on the Appellant to limit the comprehensive meaning of these words. The Appellant resorts for that purpose to the introductory passage of the will. The will preceded altogether by several years the contraction of the debt in question.

The language of the introductory declaration in the will I think, upon the whole, amounts to this—a declaration of his intent that the ownership of the *Glenlee* estate, as it was then settled, should be wholly independent of, and not affected by, the bequests or

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devises of his real and personal estate contained in his English will. The one was to be wholly independent of the other. The peculiarity in the case is, that the parties try to make out that this declaration of intention is applicable to a state of circumstances altogether different from that which existed at the date of the will, that is, at the time when the declaration was made.

The question is, whether we are warranted in taking a declaration which is applicable to one state of circumstances, and in making it applicable to a subsequent alteration of circumstances which was altogether different from what the testator intended to effect by that declaration in his will. The subsequent state of circumstances, namely, the charge of the debt upon the *Glenlee* estate, materially affected the ownership of that property. It affected also the *quantum* of the personal estate of the testator. It altered the relative position of the two, because by the heritable bond subsequently given the *Glenlee* estate is made subservient, as a security, for the augmentation of the English personal estate. Now, it would be an odd thing, and would entirely defeat the intention which dictated the declaration in the will, if we were to make that declaration perpetuate a state of things which would be entirely contrary to the spirit of the declaration and the object intended to be effected by it. The declaration was made for the purpose of preserving the then existing relative positions of the estates. But if you apply that declaration to an altered state of circumstances, you make the declaration subservient to that very purpose which would defeat its object. You make it serve the purpose of continuing a charge on the Scotch estate to the prejudice of the Scotch estate and the undue superiority of the English estate.

I do not think, my Lords, that anything of the kind can be done. I do not think you are at liberty to control the clear declaration with respect to the payment of his debts by attributing to those words an altered meaning under the altered state of circumstances from the meaning which they originally had and were intended to convey. It is absolutely necessary, in order to effectuate the purpose which dictated these words, that you should do that which the Appellant deprecates, namely, that you should restore equality by payment of the debt charged on the *Glenlee*

estate out of the English personal estate. That is the peculiar circumstance which entirely answers and annuls and neutralizes the argument of the Appellant, which rests wholly on this:—The Appellant says if the charge of the money on the Scotch estate had preceded the will, then the Scotch estate must have been left charged with the debt, and the English personal estate would not have been applied in its exoneration; and it is said that that which might have been the case if the charging of the *Glenlee* estate had preceded the will ought now to be effected, although the charging of the *Glenlee* estate has been subsequent to this declaration, and the declaration was intended only to apply to the state of circumstances existing at the time the will was made.

I think, therefore, my Lords, that the declaration cannot be used, by reason of the subsequent circumstances, for the purpose of effecting an end which was contrary to the true intent and meaning of the declaration itself; and, therefore, that the trust for the payment of the debts is wholly uncontrolled by that declaration; nay, rather, in the view I take, it is rendered more obligatory by reason of the declaration, for I take the declaration to remain in its integrity, and to be intended to preserve the relative position of the Scotch owners and the English legatees as they would have stood if the testator's death had followed immediately upon the date of the will.

I will only add that *Drummond* v. *Drummond* (1) has no application at all to this case. *Drummond* v. *Drummond* was nothing more than an illustration of the settled principle that the real estate is governed by the *lex loci*. The Scotch owner of the estate in that case took it, according to the law of *Scotland, cum onere*. That was his only title; but he tried, by crossing the border, to give himself a better title in *England* than he had in his own country, and to become entitled to the exoneration of his *feudum* out of the English property. That has no application to this case, for the testator here gives an unequivocal charge that all his debts, including, therefore, the debt in question, shall be paid out of the proceeds of the English property, he dedicates it to that purpose and there is no reason, for the grounds I have endeavoured to state, for controlling or limiting that trust by the introductory declara-

(1) 6 Bro. P. C. 601.

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tion. I am, therefore, of opinion that what is in truth the justice of the case is perfectly consistent with the law of the case.

But, my Lords, I admit that it was a fair question to be brought before your Lordships for the ultimate decision; and I hope, therefore, that your Lordships generally will acquiesce in the observations as to the costs which have been made by my noble and learned friend on the woolsack. We are particularly desirous not, in the smallest degree, to impair the rule that costs as between adverse parties ought to follow the event. At the same time, as the Court of Chancery is a Court of administration, there has been established, without prejudice to the universality and expediency of our rule, this exception, that in matters of administration, and where the suit is incidental to the administration, the costs of the suit may fairly be treated as part of the costs of the administration, and given out of the estate.

LORD COLONSAY:—

My Lords, I quite agree in the construction which it is proposed to put upon this will. I think it is not to be thrown out of view what were the circumstances under which this security was granted? What was the nature of the fund? What were the circumstances under which it came into the parties' hands? And what was the object in granting this security? I think it was a very reasonable and proper arrangement to make among the parties at the time; but the trustees could not part with the control of the fund without having some security. I think the testator would very naturally not object to grant that security, seeing that he had already made a will whereby he had directed all his debts to be paid out of his personal estate. It appears to me, that when you look at all the circumstances of the case, as far as we can trace them, they corroborate the construction that my noble and learned friends have put upon the will; and I entirely agree with them in the judgment they propose to pronounce.

LORD CAIRNS:—

My Lords, I agree with the conclusion at which my noble and learned friends have arrived in this case. But although I am not prepared to dissent from the view which your Lordships are in-

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clined to take with the costs of this appeal, I hope it will not go forth that there is any general rule of your Lordships that in every administration suit in which a question in controversy is brought up to this House, the costs are to be provided out of the fund. Your Lordships will consider, I have no doubt, in each case whether the question was one which was right and proper to be raised, and to be decided by the ultimate tribunal of appeal.

LORD WESTBURY:—

I entirely concur in the observations of my noble and learned friend. I never for one moment considered that it would be taken to follow, as an ordinary consequence, from the order contemplated to be made in this case, that the costs in administration suits should be given out of the estate. It must be limited by this, that the suit is necessary for the administration of the estate, and that it is one which has been properly brought before the Court and this House.

Decree affirmed; appeal dismissed; costs of the appeal of both parties to be paid out of the estate.

Lords' Journals, 5th May, 1870.

Solicitors for all parties: *Duncan & Murton.*

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April 20;
May 9.

JAMES BROWN LISTER . . . . . APPELLANT;
AND
HENRY PERRYMAN THE YOUNGER. . . RESPONDENT.

Reasonable and Probable Cause.

It is a rule of law that the jury must find the facts on which the question of reasonable and probable cause depends, but that the Judge must then determine whether the facts found do constitute reasonable and probable cause. No definite rule can be laid down for the exercise of the Judge's judgment.

Per THE LORD CHANCELLOR, LORD WESTBURY, and LORD COLONSAY:—It is desirable that reasonable and probable cause should be an inference of fact for determination by the jury rather than by the Judge.

L. was the owner of a rifle, which was left in the care of his coachman, *H.* The rifle had been seen and admired by *P.*, who said he wished he had one

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like it. It was stolen. *H.* told that fact to *L.*, his master, and at the same time informed him that *R.*, the coachman of a near neighbour, said he had seen it in a barn belonging to *P.'s* father, that *P.* hearing of this statement denied it, and offered to take *H.* and *R.* to the barn and shew them the gun he had there, that he did take them to the barn and shewed them a gun (which was not *L.'s* gun), and that *R.* said that was not the gun he had previously seen in the barn. *L.* caused *P.* to be apprehended for felony. *P.* was tried and acquitted, and brought an action for a malicious prosecution. Whether *L.* saw *R.* before, or only after, the apprehension, was a matter of contradictory evidence at the trial. The jury found that he had not seen *R.* before ordering *P.'s* apprehension. The judge directed the jury that that being so, he considered *L.* to have acted on hearsay evidence alone, and therefore without reasonable and probable cause, and consequently that *P.* was entitled to the verdict :—

Held (reversing the judgment of the Exchequer Chamber), that this was a misdirection, and that there must be a new trial.

THIS was an appeal against a judgment of the Court of Exchequer Chamber, which affirmed a previous judgment of the Court of Exchequer, discharging a rule obtained on behalf of Mr. *Lister* (the original Defendant), for setting aside a verdict which had been obtained against him.

The action was for false imprisonment, and the Defendant pleaded, first, not guilty ; and, secondly, that a felony (stealing of a rifle) had been committed; that the Defendant had reasonable and probable cause for suspecting the Plaintiff, and he set out, as the grounds for the suspicion—that the Plaintiff had been in the habit of coming to the Defendant's premises—had opportunities of seeing where the rifle was kept—on the 4th of March (1867) took it up and said he should like to have it—it was afterwards missed, and, according to the statement of one *William Robinson*, on the faith of which the Defendant acted, the Plaintiff had the said rifle in his possession a short time, to wit, four days, after the said 4th of March, wherefore Defendant gave him into custody, &c.

The Plaintiff took issue on these pleas ; and the action was tried before the Lord Chief Baron at the sittings after Trinity Term, 1867. Evidence was given that on the 4th of March the Plaintiff had gone to see *Hinton*, the Defendant's coachman, had taken up the rifle, and had said that he should like to have one like it, that it was afterwards missed ; that the Plaintiff had an old gun, which he used for shooting at sparrows ; that on the 7th of March this gun was lying in the barn of the Plaintiff's father ; that *Robinson*,

the coachman of a gentleman living in the neighbourhood, saw it there, and said to the Plaintiff "What are you doing with *Lister's* gun?" to which the Plaintiff answered, "It is not *Lister's* gun; it is my gun." On the 11th of March *Hinton* saw the Plaintiff in the presence of *Robinson*, and said there was a row about his master's gun, and that *Robinson* had seen it in the Plaintiff's barn. Plaintiff denied this, and asked *Robinson* and *Hinton* to come to the barn, and he would shew them the gun seen by *Robinson*. They went, and saw a gun, but *Robinson* said that was not the gun he had before seen. Plaintiff asserted that it was. The Defendant afterwards had the Plaintiff taken into custody on the charge of stealing the rifle. The Plaintiff was tried and acquitted.

For the Defendant, *Robinson* swore to having seen *Lister's* gun in the Plaintiff's barn, and having examined it, and to having declared that it was *Lister's* gun, though Plaintiff denied that fact; and that when he and *Hinton* were at the Plaintiff's barn the gun shewn him was an old musket, and was not the gun he had formerly seen and recognised as *Lister's* gun. In the course of his examination *Robinson* said that he had not seen or spoken to Mr. *Lister* before the Plaintiff's arrest. *Hinton* corroborated the evidence of *Robinson* as to the gun, and as to the interview at the barn. The Defendant *Lister*, in his evidence, said that *Hinton's* statement to him had been repeated in *Robinson's* presence; and that before he caused the Plaintiff to be arrested he had seen *Robinson*, and had ascertained that *Robinson* had seen the gun in the Plaintiff's barn, and *Robinson* stated to him (*Lister*) that he (*Robinson*) could not be mistaken about it.

The Lord Chief Baron directed the jury that if *Lister* had received the information from *Hinton* and *Robinson*, and believed their statements, that would constitute reasonable and probable cause, but if *Lister* had acted on the statement of *Hinton* alone, and had not seen *Robinson* before he gave the Plaintiff into custody, then there would be no reasonable or probable cause, and the verdict must be for the Plaintiff. The jurors found that *Lister* had not seen *Robinson* before the arrest, but believed and acted on the statement of *Hinton*, and they gave a verdict for the Plaintiff with £100 damages. On the motion for a new trial, on the grounds that there had been a misdirection, and that the verdict was

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against the evidence, *Lister* detailed in his affidavit a conversation between *Robinson* and himself on the 12th of March (the day before the arrest), and *Robinson*, in his affidavit, spoke to a conversation between himself and *Lister* on that day, and declared that at the trial he had been somewhat confused, and had answered questions without giving them proper consideration, and that after he had been examined he remembered that he was wrong upon this point.

The affidavit of a sergeant of police was produced in answer, and he stated that after having seen the Defendant he spoke on the 12th of March to *Robinson*, who told him all about the gun, and the interview at the barn, and he then said to *Robinson*, "Have you told Mr. *Lister* this?" to which *Robinson* answered, "No; I have not seen him."

On argument before the Court of Exchequer, the Lord Chief Baron and Mr. Baron *Channell* were for discharging the rule on both points; Mr. Baron *Bramwell* and Mr. Baron *Pigott* for making it absolute, on the ground of misdirection. The last-named learned Judge (as being the youngest Baron) withdrew his opinion, and judgment was entered for the Plaintiff. The case was taken to the Exchequer Chamber, where the judgment of the Court below was affirmed, Mr. Justice *Byles*, on behalf of the other Judges, said: "Where there is a ready and obvious mode of ascertaining truth, and that mode is neglected, we think that that is an element in determining the question of reasonable and probable cause. What is such a mode must depend on circumstances, and, therefore, we cannot say that the Chief Baron was wrong in saying, in this case, that the failure to make inquiries of *Robinson* was such a circumstance as to shew the want of reasonable and probable cause" (1).

Mr. *Mellish*, Q.C., and Mr. *J. C. Mathew*, for the Plaintiff in Error:—

It is admitted that the cases have decided that reasonable and probable cause is a question of law: *Johnstone* v. *Sutton* (2); *Taylor* v. *Willans* (3); because it is impossible to reduce to any definite rule the circumstances which will constitute it. But this question

(1) Law Rep. 3 Ex. 197.
(2) 1 T. R. 545.
(3) 2 B. & Ad. 845, 856; see 6 Bing. 183, and *Hailes* v. *Marks*, 7 H. & N. 56.

of law depends on facts, and where particular facts are known, the rule of law becomes at once apparent, and ought to be applied. What were the facts here? [They were stated fully.] These facts, if known to the Defendant, did afford reasonable and probable cause. So the three questions are—first, if they were true; second, if they were known to the Defendant; and third, if they were believed by him, and he acted *bonâ fide* on such knowledge. If these questions are answered in the affirmative, his justification is made out. As to the first two of these matters there was no doubt; as to the last, there was ample evidence that the Defendant believed them, and acted on them. Then the justification was complete and the Lord Chief Baron ought to have directed the jury that there was reasonable and probable cause, and that the verdict must be for the Defendant. The Defendant is not bound to shew that the information given to him is absolutely correct; it is enough that it is reasonable and probable, and that it is so given as that, being a prudent and discreet person, he honestly believes it. If in this case *Hinton* had given the Plaintiff into custody, he could have justified it on the ground that he had reasonable and probable cause, and surely his master, who *bonâ fide* acted on his information, was also justified in so doing. The Lord Chief Baron misunderstood the observations of Lord Chief Justice *Tindal*, in *Broad* v. *Ham* (1), where his Lordship said, "In order to justify a Defendant there must be a reasonable cause—such as would operate on the mind of a discreet man; there must also be a probable cause—such as would operate on the mind of a reasonable man; at all events, such as would operate on the mind of the party making the charge; otherwise there is no probable cause for him." Now, the essential part of reasonable and probable cause, as there stated, was that the Defendant should believe the statements made to him; in short, that they should "operate on his mind;" it was so here. [LORD COLONSAY:—The Lord Chief Baron says: "But I am not aware that any Court or Judge has ever decided that when the informant speaks to no fact within his own knowledge, but repeats only what he has been told by another, who may be, but has not been, questioned by the Defendant, such hearsay information, though believed to be true, necessarily amounts to reasonable and probable cause."

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Does not the word "*necessarily*" there imply that it might, although not necessarily, amount to reasonable and probable cause?] It does; and this is a case where it ought to do so. [THE LORD CHANCELLOR:—The Courts of Law do not lay down a rule defining what will constitute reasonable and probable cause, but say that the Judge must consider what will do so in each case.] That brings it to a matter of facts, and to the appreciation of the facts. Here those facts were sufficient to constitute reasonable and probable cause. The person who had the custody of the rifle found that it was stolen, he was the proper person to give information to his master, he did give that information, and corroborated it by the statement of *Robinson*, made in *Perryman's* presence, and the Defendant believed and *bonâ fide* acted on what was thus told him. [LORD CHELMSFORD:—But ought not the Defendant to have satisfied himself that *Robinson* was trustworthy, and he made no inquiry into that subject.] No doubt there must be belief in the alleged ground of the accusation: *Turner* v. *Ambler* (1); but it is for the Plaintiff to shew a want of such belief. [LORD CHELMSFORD:—That would be, in effect, to leave the question of reasonable and probable cause to the jury. THE LORD CHANCELLOR:—The questions are, whether the facts existed, whether he believed the statement of them, and whether he ought to have believed it?] All these questions are here satisfactorily answered. [LORD WESTBURY:—What do you say to the general statement in the judgment of the Exchequer Chamber as to what is necessary to be done in such a case.] That, in fact, all that is there described to be necessary was done.

The *Solicitor-General* (Sir *J. D. Coleridge*), and Mr. *Brandt*, for the Defendant in Error:—

There was not enough done here to justify the requirements of common sense, or to satisfy a reasonable man that there was probable cause for making the arrest. The rifle was gone, the Plaintiff had expressed an admiration of it. *Robinson* said he believed he had seen it in the Plaintiff's possession. *Hinton* reported this belief of *Robinson* to the Defendant, and the Defendant, without farther inquiry, had the Plaintiff arrested. No one could

(1) 10 Q. B. 252.

say that these circumstances constituted reasonable and probable cause for the arrest. The facts being found by the jury, the Judge has to declare whether they constitute reasonable and probable cause: *Johnstone* v. *Sutton* (1), *Taylor* v. *Willans* (2). That must depend on his appreciation of them. After all, that is matter for the exercise of his discretion. The Judge lays down no rule of law, he states only what is the impression produced on his mind: *Panton* v. *Williams* (3). There the rule laid down was, that if the Defendant sets up facts shewing probable cause, the Judge must determine whether the facts, if proved, constitute probable cause; the jury is to decide only whether the facts exist. That is not the subject of revision in another Court. Putting all the circumstances together, the Judge says whether the Defendant acted, according to his opinion, with reasonable and probable cause; if not, then the Defendant's liability to the action is established. Here the Judge exercised his discretion on the facts; and that cannot now be questioned. It was easy for the Defendant to ascertain what had passed between his servant and *Robinson*, and by actual inquiry from *Robinson* to determine for himself whether *Robinson* told, or did not tell the truth, whether that tale had been properly represented to him, and whether *Robinson* was to be considered a trustworthy, or a hasty, inconsiderate, and untrustworthy person. He did nothing of the kind, but deliberately abstained from doing it, and so avoided taking those steps which any prudent and reasonable man would have taken. There was nothing here to justify, nor even to excuse, this rapid putting into execution the process of the criminal law. The Plaintiff was living with his father, and there was not the least reason to suspect that he was going to run away. There was, therefore, ample time for inquiry, but without making any, except from his own servant, who was the original informer, the Defendant assumed the responsibility of having the Plaintiff arrested. The first part of the observations of Chief Justice *Tindal* in *Broad* v. *Ham* (4) stated the law correctly. The last was not in accordance with the preceding portion, the fact that the mind of the person making the charge was operated

(1) 1 T. R. 545.
(2) 2 B. & Ad. 845, 856.
(3) 2 Q. B. 169; see *Douglas* v. *Corbett*, 6 El. & B. 511.
(4) 5 Bing. N. C. 725.

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upon being wholly unimportant on the question of reasonable and probable cause, since his mind might be operated upon by a statement that was neither reasonable nor probable. Here everything depended on the accuracy of the representation made to the Defendant; no inquiry was made of *Robinson*, even as to the accuracy of what he had said, or meant to say, and every one knew how important such an inquiry was; for assuming that *Hinton* intended to tell the truth, it did not follow that he might not, in what he related to his master, have omitted or mistaken something; and if he did so, all that the Defendant had treated as certain and established might prove to be merely imaginative or blundering. There might even be good grounds for suspicion, yet not good grounds for acting on that suspicion as well founded. The Defendant took no trouble to ascertain anything as to this very probable tate of things, but at once acted on the tale of his own servant, and that servant's representation of what *Robinson* believed. That he himself felt that a previous inquiry by himself from *Robinson* would have been reasonable was shewn by the fact that he spoke of having made such inquiry, though there was every reason to believe that he was mistaken in thinking that he had made it before the arrest.

[THE LORD CHANCELLOR, referring to this apparent contradiction at the trial between the Defendant's statement and *Robinson's* as to this matter, and also to *Robinson's* affidavit subsequently made, said it was very probable that all could be reconciled by reference to the hour of the day. Perhaps the Defendant had not seen *Robinson* before the Plaintiff's arrest, but had seen him on the same day and immediately afterwards.]

But in the Court of Exchequer it had been assumed by one learned Baron that there was no necessity for the Defendant seeing *Robinson* at all, and that he was entitled to act on *Hinton's* representations alone, as he believed *Hinton* to be trustworthy. That was not reasonable; and what is reasonable must be a matter different under differing circumstances. If the Defendant here saw and made inquiries of *Robinson* after the arrest, his doing so shewed that he himself felt he had acted without making reasonable inquiry in the first instance, and no one could doubt that he had so acted.

THE LORD CHANCELLOR (Lord *Hatherley*), having stated the nature of the case, and the general purport of the evidence, His Lordship, referring to the meeting between the Plaintiff *Hinton* and *Robinson*, said:—

I will read the very words used in the special case. They are these: "According to the evidence of the Plaintiff, *Hinton* said to *Perryman*, 'There is a row about master's gun.' The Plaintiff asked what it was about, and *Hinton* said he heard from *Robinson* he had seen the rifle in Plaintiff's barn. Plaintiff denied that the rifle had been there, and asked *Hinton* and *Robinson* to come down, and he would shew them the gun which *Robinson* saw in the barn. Upon this, according to the Plaintiff's evidence, they all three went to his father's premises together, and Plaintiff shewed them a gun which was not the Defendant's rifle, and which *Robinson* immediately said was not the gun he had seen before. To this the Plaintiff replied that it was; they then went away."

These are the facts which *Hinton* communicated to Mr. *Lister*. Mr. *Lister* said at the trial that he had had communication with *Robinson* upon the subject, and that before he caused *Perryman* to be arrested he had asked *Robinson*, and that *Robinson* said he was quite sure about the identity of the gun. However, *Robinson* gave a different statement. He said that that was a mistake, and that it was not before the arrest of *Perryman*. The Chief Baron left it to the jury to say whether or not Mr. *Lister* had had communication with *Robinson* before he arrested *Perryman*, and the jury found that he had not. So that it rests upon the communication which had taken place between *Hinton* the coachman and Mr. *Lister*, the Defendant in the action. And the question was, whether or not from the information which was given by *Hinton* to Mr. *Lister*, Mr. *Lister* had probable cause in directing the taking into custody of Mr. *Perryman* the Plaintiff.

The Lord Chief Baron gave a direction upon the subject, upon which, as for a misdirection, a new trial was moved. He told the jurymen that if they believed that Mr. *Lister* had not seen *Robinson* before he caused *Perryman* to be taken into custody they ought to find for the Plaintiff. His reasons for so directing them are given fully upon the motion which took place for a new trial. It will be sufficient to read this part of them: "It has certainly

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been decided in more than one case that where anyone has lost property under circumstances leading to the supposition that it has been stolen, and he is informed by a credible person, whom he believes, that he has seen the property in the possession of the person suspected, he has reasonable and probable cause for the charge. But I am not aware that any Court or Judge has ever gone farther, and decided that where the informer speaks to no fact within his own knowledge, but reports only what he has been told by another, who may be, but has not been, questioned by him, such hearsay information, although believed to be true, does necessarily constitute reasonable and probable cause. Lord Chief Justice *Tindal*, in *Broad* v. *Ham* (1) held, 'that in order to justify a Defendant there must be reasonable cause—such as would operate on the mind of a discreet man, there must also be probable cause—such as would operate on the mind of a reasonable man, at all events, such as would operate on the mind of the party making the charge, otherwise there is no reasonable cause for him.' And the whole Court concurred with the Lord Chief Justice. Now, in this case, the Defendant swore that he acted on the information not merely of his own coachman, which was hearsay, but of *Robinson*, who declared that he had himself seen the gun on the premises of the Plaintiff, or his father. But *Robinson* swore, and the jury found, that he had made no such statement to the Defendant, who, therefore, appeared to have acted on the hearsay evidence of his coachman alone. I thought upon this, and I am still of that opinion, that a reasonable and discreet man would not have charged another with felony on the mere hearsay statement of his coachman, but was bound to have inquired into the truth and accuracy of his information from the person (who lived in the same village as himself) from whom that information was said to have been obtained." He proceeds to say, "the additional statement of the coachman that he had accompanied *Robinson* to the Plaintiff's premises, when a gun was produced which *Robinson* asserted to be a different gun from that which he had seen before, seems to me to carry the case no farther, being still matter of hearsay, and a mere repetition of what *Robinson* was supposed to have said as to the identity of the gun. Indeed, I thought that

(1) 5 Bing. N. C. 725.

this new question raised about the identity of the gun, and still depending on the credit due to *Robinson*, rendered it still more clearly incumbent on the Defendant to question *Robinson* himself, and, under all these circumstances, I held that there was an absence of reasonable and probable cause."

I certainly do concur in one of the observations made by the learned counsel during the course of his argument—that it is, on the whole, somewhat to be regretted that this question of reasonable and probable cause should not be left to the jury, who heard the evidence and saw the demeanour of the witnesses, and who would, therefore, be in a good position to judge what degree of trust it was reasonable and proper that the person to whom this information was given should repose in his informant. I should have been glad if the duty of deciding this question had not been left to those who have not the same intimate knowledge of the matter which was possessed by persons who heard the whole cause, and were, therefore, in a better position for estimating the amount of credit due, both to the original prosecutor and to the persons who may have been his informants. But what is now to be decided is this, how far this gentleman, having this information conveyed to him, may be said to have reasonably and discreetly trusted his informant. Because I apprehend that you are to have regard to every shade of difference between the amount of credit to be given to one person and to another, according to the character of the informant. Information given by one person of whom the party knows nothing, would be regarded very differently from information given by one whom he knows to be a sensible and trustworthy person. And the question whether or not a reasonable man would or would not act upon the information must depend in a great degree upon the opinion to be formed of the position and circumstances of the informant, and of the amount of credit which may be due under those circumstances to the person who thus conveyed the information.

The learned Chief Baron adhering to the view which he has here stated, Mr. Baron *Bramwell* and Mr. Baron *Pigott* took a different view of the matter. And without entering into the very able reasoning of Mr. Baron *Bramwell* upon the subject, I may at once briefly say, that there appears to me to be a slight misapprehension

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in the summing-up of the learned Chief Baron upon one or two important points. He treats the information given by *Hinton* as evidence merely of hearsay, and hearsay to which nothing is added, and he says nothing of the subsequent fact which took place, namely, the communication with *Perryman* in the presence of *Hinton*, the informant. Now, *Hinton*, in the first place, informs his master of this—that there had been an expression on the part of the accused, *Perryman*, of a desire to possess a rifle like that which he saw before him. Of course, that of itself is a slight matter. He then informs him of a distinct statement made by *Robinson* of having actually seen that rifle, which he knew, in the possession of *Perryman*. That is the hearsay to which the Lord Chief Baron refers; but then *Hinton* proceeds to inform *Lister* of another fact. He says: I went with *Robinson* to *Perryman's*, and *Robinson*, who gave that information, did not hesitate or flinch from making the charge to *Perryman* in person, which he had made against him behind his back. He charged, in my presence, *Perryman* with this act. *Hinton* says, "*Perryman* invited *Robinson* and me to go with him to the place where he said he would shew us the gun which he had." And in *Perryman's* presence *Robinson* repeated the charge that he had made, and that charge *Perryman* denied. Of course, it would be presumed that a person so accused would be likely to deny the identity of the gun. But *Robinson* did then repeat the charge and adhered to it.

Now, of course, it is one thing for a man to say that he heard a person say, So-and-so has stolen the gun, and it is another thing for him to say that he heard that person accuse the man himself of stealing the gun: "I heard him myself boldly make the charge in the presence of the person accused. I was present, and witnessed his doing so. I was present also when the accused denied the charge; but *Robinson* adhered to it, and stated firmly that that was not the gun he had seen, and that he had seen the very gun that was missing in the possession of the accused." I apprehend, my Lords, that would be very different from mere hearsay. Hearsay is, no doubt, in the first instance, of the character I have described, and it is impossible, I apprehend, to lay down any more definite rule with respect to it than that which seems to have been put in very clear and accurate language by Lord

Chief Justice *Tindal* (1). Now, applying that principle to this case, when a man whom his master regards as a trusty and faithful servant, tells his master that he had gone with *Robinson* to the accused, and had seen him with *Robinson*, and that then and there *Robinson* had repeated the accusation in the presence of the accused, and adhered to it, such information as that does appear to me sufficient to induce a reasonable man to say: This information which I have derived from my trusty servant, who has been exerting himself, and doing his best to look after my interest, and who has done all that was reasonable and proper to be done, convinces and satisfies me that the case is one in which I am justified in directing an arrest.

There was one argument urged by the learned Counsel for the Respondent to which, for a moment, I was inclined to allow some weight, namely, that you cannot lay out of the case the fact that the master swears that he did see *Robinson*, and that he asked *Robinson* this question: "Whether he could be sure that this was the gun," and that as the jury have found that he did not see *Robinson* before the arrest, we have reason for believing that the time when he saw him must have been after the arrest, and that, therefore, that cannot be relied upon as justifying the arrest. And I thought at the time, that it might be questioned whether Mr. *Lister* might not be said to have given judgment against himself as to whether or not it was right and proper that he should have seen *Robinson* before making the arrest, because the circumstance of his having sworn that he did so seemed to shew that it was in his mind a necessary and proper thing to do. But upon the whole I incline to adopt the very sensible view, as it appears to me, of Mr. Baron *Bramwell*, who says that it would have been a very reasonable thing to have done so, but it does not therefore follow that it was not reasonable not to have done so. That might have been a very reasonable thing for Mr. *Lister* to do, but yet it was not an unreasonable thing on his part to act upon the information given to him so circumstantially and truly, as it turns out (though I quite agree that we must not judge by the event), by one whom he had certainly good reason to trust, namely, his servant *Hinton*, as to facts which took place in *Hinton's* own

(1) *Broad* v. *Ham*, 5 Bing. N. C. 725; see *ante*, p. 525.

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sight and hearing, namely, the repetition of the charge, and the non-withdrawal of it after it had been denied. I think he was justified in acting upon that information so given; for unless that was so there would arise this inconvenience, that you could not trust to the information you derived from your own attorney, when, for example, you employ him to go down into the country and inquire into a matter; and unless your own attorney had brought to you the witnesses whom he went down to see, in order to ascertain and examine into the true state of the case, you could hardly justify yourself as having acted upon reasonable and probable cause. In this particular case the information was given by the coachman, who appears to have had charge of the gun to a certain extent, for it was kept in the part of the premises that he had to deal with; it was given after inquiry by him into the subject matter, and after a deliberate interview in order to justify him in judging how far *Robinson* was a trustworthy person. I think, after that, if we were to say that the master was not justified in acting upon such information because he might have gone farther, it would be very difficult to draw the line so that it would not apply to a case where a person was endeavouring to act simply upon such information as others, whether his attorney or a friend, could collect for him, probably better than he was able to collect it himself.

The judgment on the appeal to the Court of Exchequer Chamber was that of five learned Judges, delivered, with a very short expression of opinion, by Mr. Justice *Byles*:—[His Lordship read it, see *ante*, p. 524.] Now there can be no doubt, I apprehend, that the omission on the part of Mr. *Lister* to make inquiries of *Robinson* is an element, of course, to be considered, like every other element in the case. The question is, whether you are to give that weight and importance to it which was assigned to it by the Lord Chief Baron in his summing-up, because, in truth, in his summing-up it was made to be more than an element. It seems to me to have been represented to the jury as a matter which would conclusively determine the case one way or the other, because the jurymen were told, that if they found that no communication had been had by the Defendant with *Robinson*, then they were to find for the Plaintiff. That that was a proper element to introduce into the cause

nobody can question; but I do not think that it was an element of such importance that it ought to deprive Mr. *Lister* of the justification of saying, that after the inquiries he had made into all the circumstances of the case, and the unusual opportunities he had had of satisfying himself of the trustworthiness of the original informant, he, having been so informed, claimed himself to be, and was in the eye of the law, a person having reasonable and probable cause to order this arrest.

That being the case, I would suggest to your Lordships that we ought to reverse this conclusion which has been arrived at, and to direct that the rule should be made absolute for a new trial, on the ground of misdirection on the part of the learned Chief Baron.

LORD CHELMSFORD :—

My Lords, there can be no doubt since the case of *Panton* v. *Williams* (1), in which the question was solemnly decided in the Exchequer Chamber, that what is reasonable and probable cause in an action for malicious prosecution, or for false imprisonment, is to be determined by the Judge. In what other sense it is properly called a question of law I am at a loss to understand. No definite rule can be laid down for the exercise of the Judge's judgment. Each case must depend upon its own circumstances, and the result is a conclusion drawn by each Judge for himself, whether the facts found by the jury, in his opinion, constitute a defence to the action. The verdict in cases of this description, therefore, is only nominally the verdict of a jury.

The different views which may be entertained by Judges as to whether a certain state of facts does or does not furnish a reasonable and probable cause for a prosecution is exemplified by the divided opinions of the learned Judges in the Court of Exchequer in this case. I should have great difficulty in overruling the opinion of the Lord Chief Baron (2), and the judgment of the Court of Exchequer Chamber, if I had not thought that they had proceeded upon an erroneous principle. Neither of them appears to have considered whether the information conveyed to Mr. *Lister* was not, in itself, sufficient to justify him in proceeding against the Plaintiff without making personal inquiry of *Robinson*. The

(1) 2 Q. B. 169. (2) In which Mr. Baron *Channell* concurred.

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Chief Baron thought that personal inquiry from *Robinson* was required, and the Judges in the Exchequer Chamber, though not going the length of determining positively that the Chief Baron was right, concluded thus, "therefore we cannot say that the Chief Baron was wrong in saying in this case that the failure to make inquiries of *Robinson* was a circumstance to shew the want of reasonable and probable cause."

With great respect, this appears to me to have been a mistaken view of the question. The question was not whether the Defendant might have obtained more satisfactory and surer grounds of belief by applying to *Robinson* for direct information, but whether the facts brought to his knowledge furnished reasonable and probable cause for his believing that the Plaintiff had dishonestly possessed himself of his rifle, and justified him in acting on that belief without farther inquiry. In my opinion, the facts brought to the knowledge of the Defendant by his coachman, and which the jury found that he believed, were quite sufficient to justify his proceeding against the Plaintiff.

The Defendant was not only told by *Hinton*, his coachman, that he had received information from *Robinson* that he had seen the missing rifle in the Plaintiff's barn, but that he had mentioned to the Plaintiff, in the presence of *Robinson*, what *Robinson* had said to him, and that the Plaintiff had denied that the rifle was there; and that all three went to the Plaintiff's premises, where the Plaintiff shewed them a gun which was not the Defendant's rifle, and which *Robinson* said was not the gun he had seen before, though the Plaintiff said it was.

Now, very little of this statement of *Hinton's* was hearsay from *Robinson*. The greater part of it was original knowledge of *Hinton* himself. The only indirect or hearsay information communicated to the Defendant was, that *Robinson* had told *Hinton* that he had seen the rifle in the Plaintiff's barn. But this information ceased to be dependent upon *Robinson's* statement when it was repeated to the Plaintiff by *Hinton* in *Robinson's* presence. All beyond this first communication by *Robinson* to *Hinton* was equally well known to them both, and if inquiry had been made of *Robinson* he could have added nothing to the statement made to the Defendant of what had passed with the Plaintiff.

Therefore the question really comes to this: Whether in an action for a malicious prosecution where a person is proved to have acted upon the information of a trustworthy informant he can be said to have proceeded without reasonable and probable cause because he has not made inquiry of some one else who could have repeated and confirmed what was told him? It was an incorrect mode of putting the case by the Chief Baron to say that the Defendant charged the Plaintiff with felony "on the mere hearsay statement of his coachman." If the Defendant had acted immediately upon the communication of what *Hinton* had heard from *Robinson* without any inquiry, I should have agreed with him that it was not the course which a reasonable and discreet man would have adopted, and that he would have deprived himself of all ground of defence to the action. But I cannot think, with the Chief Baron, that what passed between *Hinton* and *Robinson* and the Plaintiff "carried the case no farther, and that it was still matter of hearsay, and a repetition of what *Robinson* was supposed to have said as to the identity of the gun." The introduction of the Plaintiff makes all the difference in the case. The communication which *Hinton* was able to make, and which he did make, to the Defendant was no longer what he had been told by *Robinson*, but what had passed with the Plaintiff in his own presence. He informed the Defendant that he had told the Plaintiff that *Robinson* had seen the missing gun in his possession, and that afterwards, in his presence, another gun was produced by the Plaintiff, which *Robinson* said was not the gun which he had before seen, and which the Plaintiff had been previously told *Robinson* had stated to be the Defendant's gun. In what sense this can be called hearsay, and a repetition of what *Robinson* was supposed to have said, I am at a loss to understand. That it was to a certain extent a confirmation of what *Robinson* had said as to having seen the Defendant's gun in the Plaintiff's possession there can be no doubt. But beyond this it was an original account given by *Hinton* of the Plaintiff's conduct when informed that he was charged with having the Defendant's gun, and of his exhibiting a different gun from the Defendant's, which *Robinson* stated that he had previously seen in his possession.

The Lord Chief Baron directed the jury that there was no reason-

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able and probable cause upon the assumption that all the information upon which the Defendant acted was derived from *Robinson's* statement. This was clearly a misdirection, and therefore I think that the verdict ought to have been set aside, and a new trial granted.

LORD WESTBURY:—

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My Lords, I have very few words to add. The existence of "reasonable and probable cause" is an inference of fact. It must be derived from all the circumstances of the case. I regret, therefore, to find the law to be, that it is an inference to be drawn by the Judge, and not by the jury. I think it ought to be the other way. I cannot agree with the Lord Chief Baron, because he has looked only at a part of the circumstances, not at the whole. He appears to have directed his attention exclusively to what *Hinton* told *Lister* he had heard *Robinson* say. But it is proved that *Lister* proceeded not only upon that, but upon what *Hinton* told him he had himself heard and seen. That is left entirely out of account by the Lord Chief Baron, but when added to the other it forms a very different set of circumstances, and, in my opinion, is quite sufficient to warrant the inference of "reasonable and probable cause." I cannot agree with the Judges in the Exchequer Chamber, for they lay down an abstract proposition, namely, that you can never proceed on hearsay evidence when you have a good opportunity of testing the accuracy of the hearsay evidence by examining the person who is represented to have said such and such things. It is impossible to lay down a general rule, and that proposition of the Court of Exchequer Chamber might in future cases lead to great inconveniences. The whole case has not been regarded as I think it ought to have been; and if it had been regarded correctly, I think the conclusion that would have been come to both by the Court of Exchequer and by the Court of Exchequer Chamber would have been different.

LORD COLONSAY:—

My Lords, I have listened to this case with much interest, finding myself placed in what is to me the somewhat novel position of having to deal with the question of want of reasonable and probable cause as a question of law for the Court, and not a ques-

tion of fact for the jury. I have frequently had to deal with cases of this kind in the other end of the island; but there this question of want of reasonable and probable cause is treated as an inference in fact to be deduced by the jury from the whole circumstances of the case, in like manner as the question of malice is left to the jury. If I had tried the case there I should have left this matter to the jury; and if the jury had found a verdict for the Defendant, I should have approved of that verdict for reasons I am about to explain. If, on the other hand, the jury had found for the Plaintiff, still, being a matter so much within the province of the jury, and as it could not be said that they had gone decidedly wrong and contrary to evidence, I should have held that it was not a case for the Court to interfere. But in *England* it is settled law that this is a matter for the Court to deal with. The Court deals with it as an inference to be drawn by the Court from the facts, but whether an inference of law or an inference of fact does not, I think, appear from the reports. I do not see clearly whether it is called an inference of law merely because it is left to the Court, or whether it is left to the Court because it is really an inference of law. But, undoubtedly, it appears to be settled law in this country that want of reasonable and probable cause is matter for the Court. This appears, not only from the latest case that has been alluded to, *Panton* v. *Williams* (1), but was very authoritatively laid down in the earlier case of *Johnstone* v. *Sutton* (2), in which the opinions of Lord *Mansfield* and Lord *Loughborough* were adduced in support of the proposition that such was the law of *England*. Probably it became so from anxiety to protect parties from being oppressed or harassed in consequence of having caused arrests or prosecutions in the fair pursuit of their legitimate interests, or as a matter of duty, in a country where parties injured have not the aid of a public prosecutor to do these things for them.

Finding that I had to deal with this as a matter of inference in law, I was desirous to ascertain what were the rules or principles of law by which the Court ought to be guided in drawing that inference. I did not find that there were any. Neither in the very able argument we heard from the Bar, nor in the judgments set out in these papers, nor in the cases that have been referred to,

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are any such rules or principles enunciated. I think it is laid down by the learned Lord Chief Baron that it is a mere question of opinion, depending entirely on the view which the Judge may happen to take of the circumstances of each particular case. And upon a careful consideration of the decisions, it seems to me impossible to deduce any fixed and definite principle to guide and assist the Judge in any case that may come before him. Chief Justice *Tindal's* rule seems almost the only one that can be resorted to, namely, that there must have existed a state of circumstances upon which a reasonable and discreet person would have acted. Now in the system to which I have already alluded it is thought that twelve reasonable and discreet men (as jurors are supposed to be) can judge of that matter for themselves, and that lawyers are not the only class of persons competent to determine whether the information was such as a reasonable and discreet man would have acted upon. For what is it that a Judge would have to determine? He would have to determine whether the circumstances warranted a reasonable and discreet man to deal with the matter, that is to say, not what impression the circumstances would have made upon his own mind, he being a lawyer, but what impression they ought to have made on the mind of another person, probably not a lawyer. If I look to the circumstances of this case, as they are here disclosed, and put the question to myself, I come, I own, to the conclusion, that in this case there was not a want of reasonable and probable cause, and consequently that the direction given was not, according to my view, a sound one.

The learned Chief Baron supports his direction very much on the ground that the information was only hearsay, but he guards himself against laying down any absolute rule as to hearsay in such cases. He seems rather to put it as a matter depending more or less upon the credibility of the person who gives the first information, for he puts the case of one Judge informing him of what another Judge said he had seen. In that view the credibility of *Robinson* was an element in dealing with the case. It is nowhere said, and is not to be presumed, that *Robinson* was not a credible person. It was was not left to the jury to say whether *Robinson* was a person on whose credibility the Defendant relied, or was entitled to have reliance, if he knew that he was an honest and truth-speaking man.

That is, in my opinion, a defect in the way in which, even on that view, the case was put to the jury.

The learned Chief Baron goes on to deal with the information received by the Defendant as altogether hearsay. Now I cannot view it as entirely hearsay, for *Hinton* speaks to facts to which he had been witness. He had been witness to the scene in the barn, to the fact that *Robinson* had then charged the alleged culprit with the offence. That was a fact of very considerable importance in the case. Of course the person accused denied it, but *Robinson* then and there adhered to his statement, and said that the gun then exhibited by the accused was not the gun that he (*Robinson*) had previously seen in the premises. All this was communicated by *Hinton* to his master. It is not, I think, correct to treat that as mere matter of hearsay. It was an important occurrence, at which *Hinton* was present.

I confess I am not much aided by the remarks of the Judges in the Exchequer Chamber. They say that where there is a ready and obvious mode of ascertaining the truth, and that mode is neglected, they think that that is an element in determining the question of reasonable and probable cause. I think it may be so. Then they say, "What is such a mode" (that is, a ready and obvious mode of ascertaining the truth) "must depend on circumstances, and therefore we cannot say the Chief Baron is wrong," &c. Now I cannot see the justice of the conclusion, that as the soundness of the inference must depend upon circumstances, therefore it cannot be said that the inference drawn by the Chief Baron was wrong. That reasoning would seem to lead to this, that the direction of the Judge who heard the evidence cannot be reviewed in any case, for the proper direction always depends on circumstances; and as it depends on circumstances, you cannot say that the particular direction was wrong. I cannot go along with that reasoning. I think we are compelled to form our own opinions on the import of the evidence, and if I had been forming an opinion for myself as to this matter upon the facts, as far as I see them disclosed, it would have been adverse to the direction given, which was, that the question of want of reasonable and probable cause depended entirely upon this, whether the Defendant had been in communication with *Robinson* personally upon the matter. With the utmost

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deference and respect for the opinion of the learned Judge who tried this case, I venture to think that this was not essential, though it might have been a very good and cautious thing to do. In such cases men make more or less previous investigation, according to their dispositions; but it does not follow that it is necessary to make the utmost investigation that can be made. If a reasonable amount of credible information has been received, that appears to me to be all that is required.

The *onus* of shewing that there was not reasonable and probable cause rests, in the first instance, on the Plaintiff. It is, no doubt, a negative, but it is a negative essential to the Plaintiff's case, that there was not reasonable and probable cause; and the Defendant is entitled to the benefit of the Plaintiff's failure to establish that negative. Upon the whole, I think that the judgment of the Court below should be reversed. I shall only add, that while arriving at that conclusion, I desire it to be understood that I entertain no belief that the Plaintiff was really guilty of the offence of which he appears to have been suspected.

Judgments of the Court of Exchequer and Court of Exchequer Chamber reversed; verdict ordered to be set aside, with directions that the rule for a new trial should be made absolute.

Lords' Journals, 9th May, 1870.

Attorney for the Appellant: *W. Gardiner.*
Attorney for the Respondent: *E. C. Seaman.*

MORTIMER SACKVILLE-WEST, AND OTHERS . . . . . } APPELLANTS;

AND

VISCOUNT HOLMESDALE, REGINALD SACKVILLE-WEST (LORD BUCKHURST), AND OTHERS . . . . . } RESPONDENTS.

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Feb. 14, 15;
May 16.

Will—Codicil—"Course of Entail"—Estate for Life or in Tail—Jointure—Peerage—Shifting Clause.

The general intent of a testator in creating an executory trust for a settlement of his property, not any strictly technical meaning attached to the words he has used, is to govern the preparation of the settlement.

The manner of executing an executory trust must be guided by the object of the author of the trust, provided such object is one which can be legally effectuated.

There is no difference between the construction to be put on an executory trust created by marriage articles and on an executory trust created by a will, except so far as the former, by its very nature, furnishes more emphatically the means of ascertaining the intention of those who created the trust.

Where, therefore, a codicil to a will clearly indicated the intention of a testator to annex estates and moveables to a peerage, to correspond as nearly as might be with the limitations in the patent, though the words creating the trust, and directing what should be done by the trustees, appeared to require that an estate tail should be given to the first holder of the peerage, those words were held to be explained and overruled by the expression of the general intent, and a life estate alone was given to him.

But to this life estate were appended (in order to satisfy the general intent of the testator) the conditions that the tenant for life should be without impeachment for waste, and that he might, to the extent specified in a will which the codicils recited (but for certain purposes revoked), charge the property with a jointure for his wife, and provide portions for younger children.

A. made a will, by which she devised her freeholds at *K.*, &c., to trustees, on trust for her sister *D.* for life, and after the death of *D.* to *W.*, the eldest son of *D.*, for life, without impeachment of waste, remainder to his sons successively in tail male, and, in the like manner, to the third, fourth, and other sons of *D.*, and their sons, omitting altogether *D.*'s second son. She bequeathed copyholds, leaseholds, and chattels (the last to go as heir-looms with the freehold at *K.*) to the same trustees, "upon such trusts as would best correspond" with those before mentioned concerning the freehold. The Crown afterwards granted a barony to *D.* for her life, and after her death to *R.*, her second son, and the heirs male of his body, remainder to the third, fourth, and other sons of *D.* in like manner. The patent contained a shifting clause by which, in certain events, the barony was to go over. Immediately after the grant of the barony *A.* made a Codicil by which, so far as related to the

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freehold estate at *K.*, and the leaseholds, copyholds, and chattels, the will was revoked, and she declared her intention to be to give all the freeholds, leaseholds, and chattels to trustees (not those originally named in the will, but others), in trust to settle them "in a course of settlement to correspond, as far as may be practicable, with the limitations of the barony;" and she directed these trustees to convey, settle, and assure the same "in a course of entail to correspond, as nearly as may be, with the limitations of the barony, and the provisoes affecting the same, in such manner and form, and with such powers, &c., as the trustees shall consider proper, or as their counsel shall advise." Except as altered by the Codicil the will was confirmed. On a bill to carry this trust into execution, the Court below had held that *D.* took a legal estate in the freeholds for life, and that *R.* was entitled to them for an estate in tail male, and gave directions accordingly.

On appeal, *Held* (*diss.* Lord *Hatherley*, Lord Chancellor) that the estates ought to be limited in a course of strict settlement to the second and other younger sons of *D.* for their respective lives, without impeachment of waste, with remainder to their sons successively in tail male in the order mentioned in the letters patent creating the barony; and that the copyholds, leaseholds, and chattels were to go in a similar manner so far as the rules of law and equity would allow; and that the settlement ought to contain powers of jointuring, and of charging portions.

Quære, whether the shifting clause in the letters patent was valid—But, declared that the settlement must contain a shifting clause in accordance with it.

THIS was an appeal against a decision of Vice-Chancellor *Wood* in a suit the object of which was to obtain the directions of the Court of Chancery as to the form of a settlement to be executed in accordance with the will of the late Countess *Amherst*. The Appellants were the younger children of the late Countess *De la Warr*, and the Respondents were the trustees and Lord *Buckhurst*, the chief beneficiary under the will (1).

The late Countess *Amherst* was seised, among other property, of the estate of *Knole*, in the county of *Kent*, and on the 21st of April, 1860, made her will, by which she gave her mansion-house and estate at *Knole* (with others) to the Earl of *Verulam* and *Bernard Hale*, Esq., in trust for her sister the Countess *De la Warr* "for life." And after the decease of the said Countess to the use of Lord *West* (the eldest son of Lord *De la Warr*) and his assigns for life, without impeachment of waste, with remainder to the use of the first and other lawful sons of the said Lord *West* successively in tail male, with remainder to the use of *Mortimer Sackville-West*,

(1) The Countess *De la Warr* had been one of the Respondents, but her ladyship died before the appeal was heard in this House.

the third surviving son of the Earl and Countess *De la Warr*, during his life, without impeachment of waste, &c. (in like manner as before), to the use of his first and other sons successively in tail male, and so on to the other sons of the Earl and Countess, with remainder to the first and other daughters in succession of Lord *West* in tail general, with like remainders to the first and other daughters of the other sons in succession, with several remainders over, and with an ultimate limitation to the right heirs of the testatrix. In all these provisions she entirely passed by *Reginald West*, the second son of the Earl and Countess *De la Warr*.

To each of the sons in succession, tenant for life, was given power to charge the freeholds with a jointure for his wife, not exceeding £800 a year, and with £10,000 portions for younger children, but the whole charges were not at any time to exceed £1200 a year for jointures, nor £20,000 in the whole for portions. The testatrix also devised certain copyholds and leaseholds to the trustees upon such trusts as would best correspond with those already declared concerning the freeholds, or as near thereto as might be, and the rules of law and equity would permit. And she gave the furniture, plate, pictures, &c., at *Knole* to the same trustees, upon trust that the same might go with the said mansion-house at *Knole* in the nature of heir-looms, according to the uses and limitations thereinbefore declared concerning such mansion-house, so far as the rules of law and equity would permit. But these chattels, &c., were not to vest absolutely or ultimately in any person to whom an estate tail by purchase was limited in the mansion-house, and who should die under twenty-one without issue inheritable to such estate tail. She appointed *Mortimer Sackville-West* and *Frederick Iltid Nicholl* her executors.

On the 27th of April, 1864, Her Majesty granted to the Countess *De la Warr* the dignity and honour of Baroness *Buckhurst*, of *Buckhurst*, in the county of *Sussex*, for the term of her natural life, "and after the decease of the said *Elizabeth* Countess *De la Warr* to have and hold the same state, degree, style, dignity, title and honour of Baron *Buckhurst* unto our trusty and well beloved *Reginald Windsor Sackville-West*, now second surviving son of the said *Elizabeth* Countess *De la Warr*, and the heirs male of his body." And in default of such issue the peerage was to go in the

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same manner to the third, fourth, and fifth sons of the Countess, successively, and the heirs male of their bodies.

The letters patent contained a shifting clause in the following terms: "And we will, and by these presents for us our heirs and successors do grant, direct, declare, and provide, that if the said *Reginald Windsor Sackville-West*, or any other person taking under these our letters patent, shall succeed to the Earldom of *De la Warr*, and there shall, upon or at any time after the occurrence of such event, be any other younger son, or any heir male of the body of any such other son, then and so often as the same shall happen the succession to the honours and dignities hereby created shall devolve upon the son of the said *Elizabeth* Countess *De la Warr*, or the heir who would be next entitled to succeed to the said dignity of Baron *Buckhurst*, if the person so succeeding to the Earldom of *De la Warr* was dead without issue male."

On the 3rd of May, 1864, Lady *Amherst* made a codicil, in which codicil the will was thus recited: "Whereas I have given all my manors, &c., to or in trust for my sister *Elizabeth* Countess *De la Warr* for life, with divers remainders over, *in a course of entail*." It was also recited that she had given her copyholds and leaseholds "on such trusts as will best correspond with the trusts of my said will" as to the freeholds. The grant of the dignity of *Buckhurst* was also recited, and the codicil proceeded thus:—

"Whereas it is my intention to settle the manors, hereditaments, premises and effects devised and bequeathed by my said will in a course of settlement to correspond, as far as may be practicable, with the limitations of the said Barony of *Buckhurst*, and the deeds for carrying into effect such settlement are about to be prepared, but cannot at present be completed;" and it then revoked the said devises and bequests in the will, and proceeded to devise the estates of the testatrix, freehold, copyhold, and leasehold, in the counties of *Kent*, &c., and all the statues, plate, &c., at the mansion-house at *Knole*, unto the use of Viscount *Holmesdale* and *Frederick Iltid Nicholl*, "upon trust, as soon as conveniently may be after my decease, to convey, settle, and assure all the same manors and hereditaments, copyhold and leasehold premises and effects, in a course of entail to correspond, as nearly as may be, with the limitations of the said Barony of *Buckhurst*, and the provisoes affecting

the same contained in the letters patent conferring the said dignity, in such manner and form, and with all such powers, provisoes, declarations, and agreements as the said Viscount *Holmesdale* and *Frederick Iltid Nicholl*, their heirs, &c., shall consider proper, or as their counsel shall advise." The codicil concluded thus: "Except as my will is hereby altered, I confirm the same."

The Countess of *Amherst* died on the 20th of July, 1864.

In March, 1866, Viscount *Holmesdale* and Mr. *Nicholl* filed their bill against all proper parties praying that a draft settlement might be prepared in the Judge's Chambers in order to carry into effect the intentions of the testatrix under the directions of the Court. An order to prepare the draft settlement was made. The settlement vested the estates in the trustees to the use of the Countess for life, "and from and after her decease to the use of the said *Reginald Windsor Sackville-West*, second surviving son of the Countess *de la Warr* by the Earl her husband, and the heirs male of his body," and in a similar form to the third, fourth, and fifth sons successively, and their heirs, and for default, &c., to the use of the Countess, her heirs and assigns, for ever."

A shifting clause was added in exact accordance with the words of that clause in the letters patent.

The Chief Clerk of Vice-Chancellor *Wood* certified that a proper settlement had been made. This certificate was filed on the 25th of June, 1867.

On the 26th of June, 1867, application was made to vary the certificate, and that it might be declared that, according to the proper construction of the codicil, the estates ought to be settled and limited to the use of *Reginald Windsor Sackville-West* for life, with remainder to his first and other sons in tail male, with similar limitations to the third and each other surviving son of the Countess. This application was heard in Court by the Vice-Chancellor, and dismissed on the 23rd of November, 1867 (1). This appeal was against that dismissal.

Sir *Roundell Palmer*, Q.C., and Mr. *Eddis*, Q.C. (Mr. *E. Leigh Pemberton* was with them), for the Appellants:—

The intention here was plain, and the Court, looking at the

(1) Law Rep. 3 Eq. 474.

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words of the codicil and ascertaining thereby that an executory trust was created, was bound to carry it into effect as it was there declared. That has not been done. The intention (which has been mistaken) was to make a provision for the support of the barony, and for that purpose to annex the property to the barony for the longest period allowed by law. That could only be done by giving a life estate to the first taker of the barony. To give him an estate tail was to enable him at once to destroy the connection between the title and the property, which it had been the special object of the testatrix to perpetuate.

This was an executory trust, and therefore the intention of the author of the trust, not the mere technical words used in announcing that intention, ought to be followed. The only difference between an executory trust in a will and in marriage articles is, that the latter affords stronger *primâ facie* evidence than the former of the intention to provide for issue: *The Countess of Lincoln* v. *The Duke of Newcastle* (1), *Blackburn* v. *Stables* (2). In *Jervoise* v. *The Duke of Northumberland* (3) the same principle was declared, and Lord *Eldon* there took occasion (4) to correct a misapprehension as to the meaning of what he had said in the earlier of these cases; and, observing that in marriage articles the consideration of providing for the issue affords stronger *primâ facie* evidence of intent than those created under a will, added: "But I take it, according to all the decisions, allowing for that, an executory trust in a will is to be executed in the same way." The same principle was declared by Lord *St. Leonards* in *Rochefort* v. *Fitzmaurice* (5), in an elaborate judgment, where all the previous cases were considered.

A person creating a trust of this sort may, by defining the events and explicitly declaring his own intention, become to that extent "his own conveyancer;" but he does not become so when he only gives a sketch of what he intends the settlement shall be, saying that it shall be "in a course of entail," but leaving that intention to be carried into effect by a settlement to be prepared under the advice of counsel. In such a case the testator declines to be his

(1) 12 Ves. 227.
(2) 2 V. & B. 367.
(3) 1 Jac. & W. 559.
(4) Ibid. 574.
(5) 2 D. & War. 1.

own conveyancer, and having expressed his intention assumes that effect will be given to it. In such a case the technical words he may loosely or improperly employ are not to be implicitly followed—his general intention is to be executed: *Austen* v. *Taylor* (1), *White* v. *Carter* (2), and *Bastard* v. *Proby* (3), are examples of this kind.

How the settlement to be made under such directions is to be executed was shewn in *Glenorchy* v. *Bosville* (4); and in *Papillon* v. *Voice* (5) a devise in terms like the present, where funds were vested in trustees who were directed to make the settlement, was executed by a life estate only being given. [THE LORD CHANCELLOR:—What was the indication of intention there?] In the declaration of the testator that, as to the lands devised, they were to be settled for life, and the Lord Chancellor was of opinion that as to them the will had passed a legal estate, but that as to the lands to be purchased and then settled, the direction was only executory, and the party must come to the Court to have it executed, and the Court must execute it according to the obvious intention of the testator. In *Leonard* v. *Earl of Sussex* (6), in the same manner, an estate for life alone was held to be given, the Lord Keeper *Cowper* declaring that "an executory devise for the benefit of issue was as strong as if the like provision had been contained in marriage articles." Exactly the same course was pursued in *Lord Dorchester* v. *The Earl of Effingham* (7), where the words were, that the estate was to be "attached as closely as possible to the title." A stronger phrase could not be used, yet a life estate alone was there given to the first taker. *Woolmore* v. *Burrows* (8), and *Bankes* v. *Baroness Le Despencer* (9), are to the same effect; and in the latter case the direction was, that an estate should, as far as the law would permit, be strictly settled so as to go along with the dignity of Lord *Le Despencer* as long as the person seised of the same dignity should be a lineal descendant of the settlor. In *Rowland* v. *Morgan* (10) the words were, "to his heirs Earls of *Abergavenny*," where, again, the gift was directly connected with the descent of a peerage,

(1) 1 Eden, 361.
(2) 2 Eden, 366.
(3) 2 Cox, 6.
(4) Cas. temp. Talb. 3.
(5) 2 P. Wms. 471.
(6) 2 Vern. 526.
(7) Sir G. Coop. 319; 3 Beav. 180, n.; See also 10 Sim. 587, n., and 592.
(8) 1 Sim. 512.
(9) 10 Sim. 576.
(10) 2 Phill. 764.

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and there Lord *Cottenham*, treating the gift as executory, said that the sure mode of construing it was to ascertain what general purpose was to be effected. Here that purpose was one of strict settlement; but the mode in which it was to be carried into effect was indicated by the wish permanently to annex the estates and the chattels to the title, and to do so by the best discretion of the trustees, and with the advice of counsel.

There is no real difficulty in annexing to life estates powers of jointuring and portioning if such has been the intention of the testator. *Higginson* v. *Barneby* (1) did not impeach, but rather confirmed that construction, being fully explained by the fact that other powers had been there specifically mentioned, while that one was omitted. It was, therefore, treated as intentionally left out. And *Leonard* v. *The Earl of Sussex* (2) shewed that, where an estate tail was expressly denied, a life estate might, if agreeable to the general intention of the testator, be accompanied by a proviso against impeachment of waste. It is objectionable to give to the first taker a power to destroy the estate; and *Highway* v. *Banner* (3), referred to in the Court below, shews that that objection is only removed where some one else must concur in barring the estate as settled. Such a safeguard does not exist here.

The reference to counsel is, in substance, like the declaration that the settlement should carry into effect the testatrix's wishes as far as the rules of law and equity would permit; it meant to indicate that she had manifested her intention, but did not conclusively bind her trustees by the words in which she expressed it, but left them to work out that intention effectively as their counsel should advise. The limitations in the patent and in the settlement were not to be identical in words, but identical in purpose only, which they could not be if the words of the patent were servilely followed.

Mr. *Jessel*, Q.C., and Mr. *Wickens*, for Lord *Buckhurst* (Mr. *C. Hall*, and Mr. *Kekewich*, appeared for the trustees and the other Respondents):—

The principle adopted in all these cases in modern times is that the Court must follow strictly the intention of the testator as

(1) 2 S. & S. 516. (2) 2 Vern. 526. (3) 1 Bro. Ch. C. 584.

expressed in the will. To do that the words of the will must be followed. If there is no ambiguity on the face of that instrument, none can be implied for the purpose of meeting an anticipated difficulty. If an estate tail has been clearly given to the first taker of the title, he must have it, although he may thereby become possessed of the power to bar the estate. Such a possibility is no reason for denying him his right: *Atkinson* v. *Holtby* (1). There is no ambiguity here. The intention is plain. It was to give a life interest to the Countess with immediate limitations in tail to "correspond with" the limitations in the patent. The patent furnished the form which was to be followed in making the settlement. On no principle whatever can a different interpretation be put on the unambiguous words used in this codicil. The testatrix has distinctly shewn that she has given one estate for life, but that the divers remainders over are in tail. She has given copyhold and leasehold premises, and the settlement of them is to correspond as nearly as may be with that of the freeholds. To correspond there means with regard to the nature of the title to the property, and that the title to the peerage and to the property should be identical. And as to the chattels, the trust is that they may go with *Knole* in the nature of heir-looms, according to the uses and limitations before declared concerning the mansion-house; but in such a way that they shall follow the devolution of the title. As the title comes to the first baron as an estate tail, the property must do so too. An error in a recital cannot affect the disposing part of a will where the gift is, as it is here, perfectly clear. *Dorchester* v. *Effingham* (2), where the direction was, that the estate was to be "attached to my title as closely as possible," cannot affect the present case. There the testator did not pretend to declare in what way this attaching of the estate to the title was to be effected, nor did he give any specific directions as to the form in which the estates were to be settled, nor did he expressly and directly refer to the terms of a legal document giving such estates as he desired to be inserted in the settlement. Here the testatrix has done so; she has shewn that she knew what were the limitations of the barony, and that those of the estates could not be made exactly and entirely to correspond with them; but,

(1) 10 H. L. C. 313. (2) 3 Beav. 180, n.

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quoting those limitations, she directed that the settlement should be made to correspond with them as nearly as possible. Her directions are positive, and the discretion given to the trustees, to be used with the advice of counsel, is confined to the introduction of the ordinary powers and provisoes attending the settlement of the estate. But that settlement itself is fixed to be made in accordance with the limitations in the patent. In *Dorchester* v. *Effingham* (1), therefore, a wide discretion was left to the trustees, here the limits of it are marked by the testatrix by express reference to the words of the patent. This is a mere question of construction, and the principle that must be adhered to is, that the plain intention of the testatrix, which was to make, as far as possible, the limitations in the patent and the settlement identical, is to guide the Court in framing the settlement.

The cases relating to the use of the words "heirs of the body," cited for the purpose of shewing that technical words may be made to bend to a plainly expressed general intent, do not apply here, for in all those cases the words were employed in different senses in the same will, and of course the devise was ambiguous; whereas here, the intention to confer on the holder of the peerage the same estate in the property as in the peerage is clear and unambiguous. The will and the codicil cannot for this purpose be combined together to get at the intention of the testatrix. In the will she provided for a certain set of events. In the codicil she changed all that, because the circumstances of the family had been changed. She introduced new trustees, and she made a particular person, whom she had before left utterly unnoticed, the first and direct object of her bounty. She took the patent as her model, and gave everything as nearly as she could according to the words of the patent. To refuse to adopt those clear indications of her intent, and thereby to create estates not according to the provisions of the patent, is not to follow the intention of the testatrix and to give effect to her wishes, but to make a will for her, and to substitute other purposes for those which she had in view.

There is no necessity here to give the first taker only a life estate, yet at the same time to allow him powers of jointuring and of portioning which do not properly belong to such an estate.

(1) 3 Beav. 180, n.

There is no such peculiarity in this case as to call for such an irregularity in framing the settlement. He will have those powers as of course if the estate which the testatrix intended for him, as shewn in the codicil, is given to him.

Sir *R. Palmer*, in reply:—

The object in a marriage settlement is to provide for children—here it is to endow the peerage. The same rules of construction must, therefore, be applied in each case, and the general object of the testatrix, not any particular words she may have used, must decide the form of the settlement.

THE LORD CHANCELLOR (Lord *Hatherley*) after stating the will and codicil, and the nature of the questions arising thereon, said:—

The directions of the codicil are executory, and should be carried into effect by a Court of Equity, according to principles long since established. Those principles are enunciated in the decision of Lord *Cowper*, affirmed by this House in *Lord Stamford* v. *Hobart* (1), whereby it is declared that "in matters executory, or in cases of articles or a will directing a conveyance, where the words of the articles or will are improper or informal, the Court will not direct a conveyance according to such improper or informal expressions, but will order the conveyance or settlement to be made in a proper and legal manner, so as may best answer the intent of the parties." The origin of the rule may be traced to the desire to obviate the consequence of the extremely technical doctrine in *Shelley's Case* (2).

The larger number of cases to which this principle has been applied consists of cases on marriage articles, where the articles direct a more formal conveyance to be made, and themselves express the limitations in an informal manner; the more frequent instances being those of a *limitation* to the intended husband for life, with a subsequent remainder to the heirs or heirs male of his body, or to his issue, or the like; which limitation, if introduced literally into the formal settlement, would, by the operation of the rule in *Shelley's Case* (2), at once vest an estate of inheritance in the husband, which he could, formerly by fine and recovery, and

(1) 3 Bro. P. C. (Toml. Ed.) 31–33. (2) 1 Co. Rep. 93.

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now by deed, put an end to, thus destroying the very object of the settlement. The purpose of the instrument has been held in such cases sufficient to indicate the intent of the parties to be, that the property should be limited in what is called "strict settlement." The only difference in the case of a will, or deed of gift, not being marriage articles, is this, that the intent must appear in some manner on the face of the instrument in order to justify the Court in directing a settlement which does not follow the exact words employed in the instrument containing the executory trust, but by varying them effects the presumed intention of the parties. Thus, for instance, a limitation of an estate for life to the first taker, followed by a limitation to his heirs, general or special, or a direction that the first taker shall be unimpeachable for waste (which he would be as of course, if he had been intended to take an estate of inheritance), or a direction that he shall not have power to bar the entail or the insertion of trustees to preserve contingent remainders, have all been held to afford indications that the first taker's estate is to be one for life only. But in a case where none of those indications existed, *Blackburn* v. *Stables* (1), Sir *William Grant* declined to cut down the interest of the first taker under an executory trust, the gift being (without words of inheritance) to the testator's nephew at twenty-four; and if he had no son, to a son of the testator's great-nephew, with a direction that the executors of the testator should not give up the trust until "a proper entail was made to the male heir of the person who should take under his will." Sir *William Grant* ordered a conveyance to be made to the nephew in tail male, refusing to cut down the ordinary legal effect of the limitation to the "heir male."

It may also be remarked, that even in the case of marriage articles the Court has declined to depart from the very words of the articles in framing the formal deed of settlement in cases where the estate tail cannot be barred by the first taker, whether husband or wife, alone, but, for that purpose, requires the concurrence of both husband and wife. This was determined by Lord *Cowper* (the Judge who decided *Stamford* v. *Hobart* (2)) in *Honor* v. *Honor* (3), where the limitations in the articles (the property

(1) 2 V. & B. 367.

(2) 3 Bro. P. C. (Toml. Ed.) 32–33.

(3) 1 P. Wms. 123.

being that of the husband) were to the husband for life, remainder to the wife for life, remainder to the heirs of her body by her husband; and again by Lord *Thurlow*, in *Highway* v. *Banner* (1), where the limitation directed to be inserted in the settlement was of copyholds to the husband for life, with remainder to the heirs of the wife by him, with remainder to the wife for life if he survived, and to the heirs of his body by her if she survived. They did, in fact, destroy the entail by concurring in a surrender, and it was held that they were entitled so to do.

These examples will suffice to shew:—1. That the intent must be so manifested on the face of the instrument directing the settlement to be made that the technical words used cannot be followed in the perfect instrument without defeating the manifest intent of the parties. 2. That in articles made before marriage there will be an assumed intent, assumed from the nature of the case, that the settlement should not be liable to immediate destruction by the act of the settlor, and the Court will alter the words so as to prevent the settlor taking an immediate estate tail. 3. That even in such a case the intent is not sufficiently strong to prevent the very words of the articles being used, though an estate be directed to be given to the husband (the settlor) for life, with a limitation to the heirs of his body, if that limitation is so framed as to prevent his destroying the estate without the concurrence of the intended wife. 4. That in the case of a will, or deed of gift, the intention that the very words mentioned in the instrument as proper for the more complete conveyance are not to be used must be plainly manifested by the first instrument, and will not be assumed merely because the trust is executory.

Now, in applying these principles to the present case, I ask, What evidence is there in this codicil that the testatrix—referring, as she does, to an existing and carefully prepared instrument (viz., the letters patent), and stating her desire to settle her property, which comprised freehold, copyhold, and leasehold estates, and personal chattels, in "a course of settlement to correspond, as far as may be practicable, with the limitations therein of the barony" —intended the property to be settled in any other manner, or in any other words, than she thus indicated?

(1) 1 Bro. C. C. 584.

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Great stress was laid in argument upon the fact recited in the codicil that she had devised her freeholds to her sister for life, with divers remainders over in a "course of entail," and upon her afterwards speaking of her intention to settle her property "in a course of settlement" to correspond with the limitations of the barony, and directing the trustees to settle it "in a course of entail to correspond with such limitation of the barony." It was argued that the limitations in the will are all in strict settlement, and that this must be what she intends by the expression, a "course of entail."

Now, I confess the much more natural and reasonable construction of her words, to my mind, is this: Her "course of settlement" in the will began with the first son and his issue male, and then, excluding the second son and his issue male altogether, took the course of proceeding from the first to the third, and then to the other younger sons and their respective issues male, and then the course of settlement proceeded to the first and other daughters of the eldest, and of the third and other younger sons successively in tail. The "course of settlement" and "course of entail" in the letters patent, on the contrary, exclude the eldest son altogether, and introduced first the second son and his issue male, and then the third and other younger sons and their issue male. The will also introduces the daughters of the sons exclusive of the second son and their issue, whilst the letters patent exclude the daughters altogether. There being, then, a necessity for pointing out the difference in the "course of entail" and "course of settlement" as regards the objects of her bounty, I do not think that those words of the testatrix can be strained from this their natural meaning to include still farther a course of strict settlement so as to reduce the estates limited by the patent to life estates.

Having, I think, removed the supposed cogency of any argument derived from the use of the words "course of settlement," or "entail," I will next observe that I am not aware of a single authority that can be cited where, in the case of pure bounty, the testator, referring to an existing legal instrument as containing the limitations of the very settlement which he desires to adopt, has been held not to mean that set of limitations, but some other more restricted form. He may make a slip in his own use of technical

language, but it is a very different thing when he points out a regularly prepared legal instrument as the model of the conveyance that he desires to have executed. In *Lord Dorchester* v. *Lord Effingham* (1) the testator directed that all his landed estates should be "attached to his title as closely as possible." There is no such direction here; but it is said that, regard being had to the circumstances of the case, it must be assumed that the testatrix intended the same thing as was expressed in *Lord Dorchester's Case*, that she changed the devolution of her estates, left out the eldest and inserted the second son, solely with reference to the circumstance of the title having been granted, and must therefore be taken to have intended tying the two together indissolubly as far as the law would allow; and that this is farther evidenced by her directing that the limitations shall "correspond as far as may be practicable with the limitations of the barony;" for it is said that the word "correspond" rather indicates harmony, or suitableness, than identity.

It is farther said that a peerage is in effect in each holder a life interest, being inalienable by the successive takers, and that, therefore, a restriction of alienation, continued as long as the law will allow, best harmonizes or corresponds with the limitations in the patent. I do not desire to underrate the force of some of those arguments, but I do not think them of weight sufficient to authorize our departure from a plain indication by the testatrix herself of her intent. She had full knowledge of the limitations in the patent, the first two of which she correctly recites, and the rest of which she points out as the model for the intended settlement, including the special "provisions" in the patent.

I cannot admit that the proper meaning of "corresponding" is "harmonizing with" or "being suitable to." I think such meaning is a secondary meaning only. A foot-mark "corresponds" with the foot when it has been made by it. A copy of an instrument corresponds with the original when the wording and paging, and, if possible, the handwriting agree. A lease corresponds with the counterpart. If the necessity of a difference of limitations be assumed, you may use "correspondence" as meaning the making things agree as well as you can under such a condition; but that

(1) Sir G. Coop. 319; 3 Beav. 180, n.; 10 Sim. 587, n., 592.

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is not the first meaning, and a draftsman told to make two drafts correspond with reference to any hereditament capable of identical limitations would, I apprehend, make the limitations identical. Here, as also in the will, there were some subjects incapable of exactly corresponding limitations, and I think the testatrix uses the word correctly, both in the will and in the codicil, when in the will she directs the limitations of the copyhold and leaseholds to be such as will best and nearest correspond with those of the freeholds, "or as near thereto as may be," and in the codicil directs "a course of entail" to correspond as "nearly as may be with the limitations of the barony, and the provisions affecting the same." She had in the previous part of the codicil recited her intention that they should correspond "as far as might be practicable," that is to say, she directs the conveyances to approach as near as law will allow to identity. I do not see how by this she indicates an intention that the limitations shall differ while they might be identical, or that an estate tail given in the patent shall be cut down in the settlement to an estate for life. The law would allow the limitations of the estates to be identical with those of the barony in the absence of a presumed contrary intention on her part. How can her desire "for correspondence" indicate of itself that intention?

But it is said the barony is inalienable, and it is therefore probable that the testatrix would desire, as far as possible, to impress that quality on the land in any settlement to be made. I think that the assumption here involved, viz., that the testatrix desired to tie the barony and estates together as long as possible, is not only unwarranted by any words in the codicil, but the assumption, if made, would in effect render it necessary to manipulate the limitations of the settlement, as compared with those of the letters patent, to an extent far exceeding anything yet achieved in the way of effecting presumed intention.

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The patent contains a clause of very doubtful validity, a proviso for the shifting of the barony if any holder of the title become Earl *De la Warr*, and this *toties quoties*. It would be necessary then to model the shifting clause of the conveyance to meet the not improbable case of the clause being held void in the patent as regards the peerage. This could, no doubt, be done by declaring

that the shifting clause should become void in the deed if held to be so in the patent; but this would be a very strong step where the testatrix has directed the conveyance to correspond with the limitations contained in the patent, and "the provisions affecting the same."

I may farther observe, that in one event, happily not very probable, the proposed modification of the limitations expressed by the testatrix might introduce the very separation of the title and estates which it is assumed is to be avoided. For if the sons be reduced to life estates, an attainder might leave the estates in the possession of the attainted tenant for life's family, whereas under the patent the barony would go to the next son's family.

Again, I am far from satisfied that if the Court were in this case to cut down the limitations directed by the codicil to estates for life, it would be possible to insert adequate powers for raising portions and charging jointures upon the estates. The words that the settlement shall contain "all such powers and provisions as the trustee shall think proper and counsel shall advise," may well refer to the ordinary powers of leasing, and of sale and exchange, which have been termed by Sir *John Leach*, in *Higginson* v. *Barneby* (1), "powers of management" as distinguished from powers creating a charge on the estate. It is said that the will of the testatrix shewed her view of the proper extent of the powers as to the amount of charge. But can we infer that what she thought reasonable with regard to the estate, when either united to the estates of the *De la Warr* property on the one hand, or if separated from those estates, then also separated from any peerage on the other (for the third and not the second son of Lord and Lady *De la Warr* was to take under the will), she would think reasonable with regard to the *Buckhurst* peerage. So again, as to impeachment for waste, would or would not that be left to the trustees to determine if the sons' estates are to be cut down to life estates? If, on the other hand, the directions in the codicil be followed, the peer's wife will enjoy her dower in the estates as she does her title and privilege of peerage, and he himself will be at liberty to cut timber. Lastly, I would observe that the limitations, if guided by the patent, place the settlement under

(1) 2 S. & S. 516.

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the protection of Lady *De la Warr* as tenant for life. With her concurrence a resettlement could be made on the marriage of the eldest of the sons, or otherwise, as occasion might require, and without it the estate could not be alienated. It is said the son might bar his own issue, but it is in the highest degree improbable that he would dispose of a base fee, or that anyone would be found to purchase it. At all events, in *Highway* v. *Banner* (1) the very destruction of the settlement, which did actually there occur by the concurrence of husband and wife, was upheld, because but for that concurrence it could not have been effected, and this, too, in the strong case of articles before marriage.

I think, therefore, in the present case there is neither sufficient ground in the nature of the instrument, nor in the words used, to induce a Court of Equity to depart from the plain directions of the testatrix.

First: She has not used any words informally, carelessly, or ignorantly, but has referred to a formal, carefully-framed instrument as containing the limitations to which those in the future settlement are to correspond.

Secondly: The intention to tie the peerage and the estates together as long as possible is assumed without anything on which to ground the assumption but the fact that the conferring of the peerage was the moving cause of the gift.

Thirdly: The limitations of the patent would secure the continuation of the settlement during the lifetime of Lady *De la Warr*, whilst it would give her and the first expectant son the opportunity of providing effectually for a resettlement of the property to meet any exigencies of the family in which the peerage might be vested, such protection being at least as effectual as that of the necessity for the concurrence of husband and wife, as in *Highway* v. *Banner* (1).

Fourthly: It is to my mind by no means clear that a departure from the proposed model will secure the continued union of the peerage and estates more effectually than if the directions of the testatrix be observed.

I think that in extending the doctrine of executory trusts to a case in which it is necessary to depart most materially from the

(1) 1 Bro. Ch. C. 584.

model proposed by the testatrix, and to insert powers of jointuring and of raising portions without any guide but that of a previous settlement of an entirely different character, upon a family already possessed of a title and large estates, the Court will assume the power of making a will for a testator far beyond anything warranted by authority, or by principle derived from authority.

I am, therefore, of opinion that the decree complained of is right, and that the appeal should be dismissed; but your Lordships who are of a contrary opinion will probably think it proper to make suitable declarations as to the shifting clause, and as to the powers to be inserted in the settlement.

LORD CHELMSFORD:—

My Lords, the second codicil to Lady *Amherst's* will creates an executory trust; that is, it makes the intervention of trustees necessary to give effect to the intention expressed in it. The question to be determined is "whether," to use the words of Lord *St. Leonards* in *Egerton* v. *Earl Brownlow* (1), "the testatrix has been her own conveyancer, whether she has left it to the Court to make out from general expressions what her intention is, or has so defined that intention that you have nothing to do but to take the limitations she has given you, and to convert them into legal estates."

In considering a question of this description the Court is not confined to the language of the will itself in order to discover the intention of a testator; it may not only refer to the motives which led to the will, and to its general object and purpose, to be collected from other instruments to which the will itself refers, but also to any circumstances which may have influenced the mind of the maker towards the provisions it contains. The best illustration of the object and purpose of an instrument furnishing an indication of intention in the case of executory trusts, is to be found in the instance of marriage articles, where the object of the settlement being to make a provision for the issue of the marriage, no words, however strong, which in the case of an executed trust would place the issue in the power of the father, will be allowed to prevail against the implied intention.

(1) 4 H. L. C. 210.

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So, as Sir *William Grant* said, in *Blackburn* v. *Stables* (1), "in the case of a will, if it can be clearly ascertained from anything in the will that the testator did not mean to use the expressions which he has employed in their strict proper technical sense, the Court in decreeing such settlement as he has directed will depart from his words to execute his intention."

There can be no doubt that the sole object of the second codicil to Lady *Amherst's* will was to annex her estates to the dignity of *Buckhurst*, and that but for the creation of this dignity the limitations in the will would, in all probability, never have been changed.

By the will, dated the 21st of April, 1860, Lady *Amherst* devised:—[His Lordship here stated the material provisions of the will—the creation of the peerage, with the shifting clause in the patent, the recitals in the codicil, and the directions on which the question in the case turned.]

The sole object of the codicil being that the estates should be annexed to the newly-created title it can hardly be supposed that if the testatrix had been asked whether she intended that the first remainderman should have the power of separating them, and disappointing his successors in the barony, she would have answered in the affirmative. No doubt, even in a course of strict settlement the time must come when the possessor of the estates will have the power of producing this separation; but it is hardly conjectural that the testatrix would have wished to postpone this event as long as it is possible by law.

Has she then used language of such an imperative description as to compel the trustees to follow implicitly her dictation in the form of the intended limitations of her estates?

There are cases of executory trusts in wills in which even the words "heirs of the body" have been made to bend to indications of intention that the estate should be settled strictly. And a direction in a will that a settlement shall be made as counsel shall advise, has been held sufficient to shew that the words "heirs of the body" were not intended to have their strict legal effect. Now in the codicil there is such a direction; for I cannot agree with the argument of the counsel for the Respondent that the discretion of the trustees, or the advice of counsel, is limited to the insertion of

(1) 2 V. & B. 370.

such powers, provisoes, declarations, and agreements as they may think proper. They are to convey, settle, and assure the estates in such manner and form, and with all such powers, &c., "as the trustees shall consider proper, or as their counsel shall advise."

The words of the codicil do not, in my opinion, express such a clear and definite description of the limitations intended by the testatrix as to control the discretion of the trustees.

The general intention of the testatrix is expressed in the recital in the codicil to be, "to settle the estates devised by her will in a course of settlement to correspond, as far as may be practicable, with the limitations of the Barony of *Buckhurst*," and she directs her trustees "to convey, settle, and assure her estates in a course of entail to correspond as nearly as may be with the limitations of the barony." There can be no doubt that the words "course of settlement," and "course of entail," and "as far as may be practicable," and "as nearly as may be," were used as equivalent expressions.

It appears to me that the words of the codicil express an intention that the barony and the estates should go together to the same person, but not that the limitations of the two should be identical. The testatrix had by her will settled her estates in a course of entail, which, in consequence of the creation of the peerage in favour of the second son of Lady *De la Warr* (who had been altogether omitted from the will) she desired to alter. She proposed, therefore, to change the order of succession, and to make it agree with that prescribed in the letters patent creating the Barony of *Buckhurst*, with a view of endowing the title. She, therefore, directs her trustees to settle her estates in a course of entail to correspond, as nearly as may be, with the limitations of the barony. The word "correspond" does not mean that the limitations are to be exactly the same, but that they are to be adapted to each other, so as to carry out the testatrix's intention that the estate and the title should go together. The language of the codicil is quite susceptible of the interpretation that the course of entail should correspond in the order of succession with the limitations of the barony, and that the settlement to carry out this object should be in such manner and form as the trustees considered proper, or as their counsel should advise.

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There is another circumstance which strongly impresses my mind with the conviction that a strict settlement ought to be decreed. The trustees are to settle the estates, not only in a course of entail to correspond with the limitations of the barony, but also with the provisions affecting the same contained in the letters patent. Now, one of the provisoes is that by which the dignity of *Buckhurst* is to shift upon the descent of the Earldom of *De la Warr* upon its possessor. It is unnecessary to determine the effect of this clause upon the Barony of *Buckhurst* if the successor to the earldom has previously taken his seat in the House as Baron *Buckhurst;* but there can be no doubt that a shifting clause in the very words of the letters patent would be good as to the estates. The testatrix must have thought that proviso valid, and have intended that the estates should shift with the title. But if the settlement were to be framed with a limitation in the words of the letters patent to *Reginald West*, and the heirs of his body, Lord *Buckhurst* would be able immediately to defeat this intention, and by converting his estate tail into a fee, to separate the estate and the title for ever.

Upon the question whether, if the trust is executed by a strict settlement, the successive tenants for life are to be unimpeachable of waste, it appears to me that the second codicil is to be regarded merely as the will altered to meet the altered circumstances occasioned by the creation of the Barony of *Buckhurst*, and as intended to introduce no farther change than to place *Reginald*, in consequence of his right of succession to the barony, in the same position as his elder brother, Lord *West*, occupied in the will. The settlement is to be made with all such powers, provisoes, declarations, and agreements as the trustees shall consider proper or their counsel shall advise. I think that, looking to the sole reason for revoking the will, it ought to be regarded as nearly as may be as the pattern of what is to be substituted for it, and that the trustees would have been perfectly justified in annexing to the life estates the privilege of being unimpeachable of waste.

There is, perhaps, a little more difficulty with regard to the powers of jointuring and portioning younger children, on account of there being no amount mentioned within which the discretion of the trustees is to be exercised. But I have already expressed my

opinion that, under the peculiar circumstances of this case, the will of the testatrix may be taken as the model to which her intention in the second codicil may be referred. There can be no doubt that but for the want of a specified amount the powers of jointuring and portioning would naturally find their way into a settlement where the powers to be inserted are left to the discretion of trustees. And it appears to me that if the trustees had introduced into a settlement such powers, with amounts corresponding to the sums mentioned in the will, their discretion could not have been successfully questioned.

I have, upon the above grounds, come to the conclusion, that the order of the Vice-Chancellor must be reversed, and that the estates of Lady *Amherst* ought to be settled in strict settlement, with a shifting clause similar to that in the letters patent creating the Barony of *Buckhurst;* that the successive life estates should be made unimpeachable of waste; and powers of jointuring and portioning introduced similar to those contained in Lady *Amherst's* will.

LORD WESTBURY:—

My Lords, an executory trust may be created by an agreement or direction to make a settlement or conveyance. Such a trust is executory in this peculiar sense, that it is fulfilled or exhausted when the contemplated settlement or conveyance has been made. The subjects of trusts in general are the ownership, management, and enjoyment of property, and in that sense all trusts are executory; but the subject of an executory trust, properly so called, is the particular deed or instrument which is to be made, and not the property which is comprised in it. An executory trust will be carried into effect by a Court of Equity according to the intention of the parties, as collected from the words of the agreement or direction, provided such agreement or direction be within the limits of legality.

In construing the words creating an executory trust a Court of Equity exercises a large authority in subordinating the language to the intent. Thus, in marriage articles containing an agreement that his estate shall be settled on the intended husband for life, and then on the heirs of his body, a Court of Equity discerns an

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intention that the issue shall take as purchasers, and it refuses therefore, to give to the words "heirs of the body" their proper effect and meaning at common law, but directs a settlement on the first and other sons in tail. In this case, the words "heirs of the body" are neither informal nor imperfect, but their legal effect is overruled by the intention.

It is of the essence of an executory trust that it should not be fully expressed or declared in the instrument creating it, but that it should require some farther deed or instrument for its complete legal expression. Thus, an executory trust may be created by a testamentary gift of property to trustees, with a direction that it shall be settled in strict settlement upon *A.* and the issue of his body, in which case a Court of Equity would put a meaning upon the words "strict settlement," and direct a conveyance of the property accordingly. Again, an executory trust may be created by a reference to some existing settlement of property which may be described as a settlement, or an "entail," and then directing other property to be settled or entailed, in which case a Court of Equity would be justified in construing the words "settled or entailed" as words intended to denote and signify that series of limitations and estates which the settlor has referred to and designated by the term "settlement" or "entail." In the case last supposed there is clearly an executory trust; but the manner of executing it is defined by the author, and the Court has no other duty than that of carrying the direction so given into effect. In such a case the settlement, or entail, referred to is, in fact, the model for the settlement directed to be made. The question is, whether the case before us is one of this latter description, and that depends upon the true construction of the words used by the testatrix.

The codicil begins by a reference to the will, and by a recital that all the estates of the testatrix in the counties of *Kent*, *Warwick*, *Gloucester*, and *Sussex*, had been by her will devised to or in trust for her sister *Elizabeth* for life, with divers remainders over "in a course of entail." Now the series of remainders contained in the will, which are here compendiously designated by the words "in a course of entail," were limitations to the use of the eldest son of the Countess *De la Warr* for life, with remainder to his first

and other sons in tail male, with remainder to the third son of the Countess *De la Warr* for life, with remainder to his first and other sons in tail male, with remainder to the fourth son of the third Countess *De la Warr* for life, with remainder to his first and other sons in tail male, with remainder to the fifth son of the Countess for life, with remainder to his first and other sons in tail male, with similar remainders to the daughters of the said sons; and powers of jointuring and charging portions for younger children are given to the successive tenants for life.

It will be observed that in the will the second son, *Reginald*, is passed over, but in the letters patent granting the barony of *Buckhurst* the dignity is limited to the Countess for life, with remainder to *Reginald;* and the codicil, after having adverted to this fact, recites that it was the intention of the testatrix to settle the manors and hereditaments, premises and effects, devised and bequeathed by her said will in a course of settlement to correspond, as far as might be practicable, with the limitations of the Barony of *Buckhurst*. And she accordingly revokes the devises, gifts, and bequests of the freehold, copyhold, leasehold, and personal estates and effects contained in her will, and devises and bequeaths the same to trustees upon trust, as soon as conveniently might be after her decease, to convey, settle, and assure the same in "a course of entail" to correspond as nearly as may be with the limitations of the said Barony of *Buckhurst*, and the provisoes affecting the same contained in the letters patent.

These last words contain the executory trust, or direction for a settlement. In these operative words two directions are contained —one to settle the estates in "course of entail," the other that the entail shall correspond as nearly as may be with the limitations of the barony. The testatrix must be regarded as using the words "in a course of entail" in this part of the codicil in the same sense in which she had used them in the preceding part of the same instrument, where they are used as a short description of the limitations contained in the will under which the sons of the Countess *Elizabeth* (with the exception of *Reginald*, who is passed over) take as tenants for life only, with remainder to their first and other sons in tail; and it seems plain that if the direction to settle had stopped with the words "in a course of entail," the sons

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of the Countess *Elizabeth* included in the letters-patent of the barony must have taken for life only, with remainder to their first and other sons. The question which then arises is, whether these words "in a course of entail" are controlled, and ought to receive a different interpretation, in consequence of its being directed that the course of entail is to correspond as nearly as may be with the limitations of the Barony of *Buckhurst*. The Barony of *Buckhurst* is an inalienable hereditament, over which *Reginald*, to whom the first estate in tail male is limited by the patent, could exercise no control so as to prevent its descending in a perpetual course of inheritance to the heirs male of his body; and the same inalienable character would secure its passing on to the next persons named in the order of limitation after the heirs male of the body of *Reginald* are exhausted. It seems clear that the correspondence which is directed to be effected between the limitations of an inalienable dignity and the limitations of alienable estates must be produced by rendering the estates inalienable as far as the rules of law and equity will permit; and, consequently, every person who is tenant in tail male of the barony must, if the law of perpetuity will admit, take a life estate only in the estates and property. The correspondence directed to be produced must be between the rights of ownership and enjoyment of the barony and estates respectively. Entire correspondence there cannot be, by reason of the inalienable character of the one, and the alienable character of the other. But that does not detract from the obligation of making the enjoyment of the one answer and follow the ownership of the other, as far as it is practicable to do so.

It is obvious that to make *Reginald*, who holds the barony in tail male, tenant in tail male also of the estates and property, would be a correspondence in words but not in legal effect; for it would put it in the power of *Reginald* to make his ownership of the estates and property altogether different from his ownership of the barony, and his interest in the one subject would no longer correspond with his interest in the other. A strict settlement of the estates which shall tie them on to the barony, as long as the law will permit, is the only mode by which correspondence of ownership can be effected. All this flows directly from the mere words

used by the testatrix. But, independently of this, it is plain from the whole of the codicil that the general and leading intent of the testatrix was to make provision for the support and maintenance of the dignity; and it would be a mere mockery of this intent and purpose if the estates were settled so that they would at once become the absolute property of *Reginald* to the disherison of all subsequent possessors of the dignity under the letters-patent.

The manner of executing an executory trust must be guided by the intention and object of the author of the trust, provided the same can be legally effectuated. In this case I think it plain, as well from the particular expressions used by the testatrix as from her general intent, which is sufficiently indicated, that her desire and object were that the estates and property devised and bequeathed by her codicil should be united to the Barony of *Buckhurst* as long as the rules of law will permit, and with that and some other declarations I think the case must be remitted to the chambers of the Vice-Chancellor to have a proper settlement prepared in conformity therewith.

Great difficulty appears to have been felt in the Court below upon the question whether, in the settlement to be made, powers of jointuring and of charging the estates with portions for younger children should be given to tenants for life. It is unnecessary to discuss the several cases that have been referred to on this subject, because, in my opinion, the words of the codicil point to the settlement made by the will as the example or model to be followed, and which, therefore, authorizes the introduction of such powers.

With respect to the shifting clause in the letters patent, I cannot but express my astonishment at finding such a proviso in letters patent of nobility. It is, I believe, quite unprecedented. Whether it is valid in law, and capable of being made legally effective, are questions on which it is not for this House now to pronounce an opinion. I do not think anything can be done beyond transferring to the settlement the proviso exactly as it stands in the codicil. The order of the Vice-Chancellor must, in my opinion, be reversed.

LORD COLONSAY:—

My Lords, in a case which has undergone so much consideration, and has resulted in such difference of opinion, there must be dif-

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ficulty. But the difference of opinion is not so much in regard to the principles by which such cases should be governed as in the application of those principles to the circumstances of this case.

We are here dealing with what, in the law language of *England*, is called an executory trust. The instrument does not profess to carry into execution the purpose of the testator. It professes only to express the purpose or intention of the testator, and to give to other persons power and instructions for carrying that intention into execution. The intention may be more or less clearly expressed, the direction or instruction may be more or less explicit. The language of the trust is not to be assumed to be the language in which the ultimate deed is to be expressed.

In such cases the first thing to be looked for is the intention of the testator, and that is to be collected from the tenor of the instrument—the motive, if any, disclosed—the object sought to be attained—and all the circumstances that appear to have been in the knowledge and mind of the testator. Even the use of artistic words, if used inartistically, in an inartistic instrument, will not necessarily control the intention otherwise manifested.

In the present case certain things are clear. First: That the testator's first intention was to settle her estates on Lord *West*, giving him a life interest with remainder to his heirs male. Secondly: That she altered that intention and resolved that her estates should go to the second son. Thirdly: That the reason of that change of intention was that a new peerage (the Barony of *Buckhurst*) had been created in the family which was to go to the second son. In making this total change, and for this avowed reason, she declares her intention to be to settle the manors and hereditaments in a course of settlement to correspond, as far as may be practicable, with the limitations of the said Barony of *Buckhurst;* and she directs her trustees "to convey, settle, and assure the manors and hereditaments in a course of entail to correspond as nearly as may be with the limitations of the said barony of *Buckhurst*," with certain provisions and declarations. "To correspond as nearly as may be." What does this mean? To correspond in words or to correspond in effect? Did she intend that the estates should go and continue as far as practicable in the same line of transmission as the peerage, or did she not. The

nature of the rights being different, the one alienable, the other not, the same words would not produce the same results as to succession. Correspondence in words would achieve or might achieve nothing beyond the first generation. Correspondence in effect might achieve a great deal. If she intended to endow the new peerage (which I cannot doubt) then I think that the direction to make the course of settlement correspond as nearly as may be with the limitation of the patent, must mean to correspond in effect as nearly as may be. Correspondence does not necessarily mean identity, it equally means adaptation, and it has various meanings to be gathered from the circumstances in which the word is used. I think, farther, that the tenor of the previous will throws some light upon the intention, for we gather from it at least one of the *indicia* of intention; and I think that unless correspondence between the patent and the settlement was in effect desired, it is improbable that the direction would be given by reference to an instrument which was not intended to deal with the same kind of subject, instead of being simply and directly expressed in the usual form. I therefore think that a clause should be introduced into the settlement corresponding in effect with that contained in the patent.

LORD CAIRNS:—

My Lords, the second codicil to the will of the testatrix, Lady *Amherst*, creates what is commonly described as an "executory trust," that is to say, not a trust which remains to be executed, for in this sense all trusts are "executory" at their creation, but a trust which is to be executed by the preparation of a complete and formal settlement, carrying into effect, through the operation of an apt and detailed legal phraseology, the general intention compendiously indicated by the testatrix. The codicil is, in fact, equivalent to directions or instructions for a settlement.

The general rule applicable to such cases is stated by Lord Chancellor *Cowper*, in the preamble of the decree in the case of the *Earl of Stamford* v. *Sir John Hobart*, a decree which was affirmed in this House (1). That decree runs thus:—"This Court

(1) 3 Bro. P. C. (Toml. Ed.) 31–33.

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doth declare that in matters executory, as in cases of articles or a will directing a conveyance where the words of the articles or will are improper or informal, this Court will not direct a conveyance according to such improper or informal expressions in the articles or will, but will order the conveyance or settlement to be made in a proper and legal manner, so as may best answer the intent of the parties; and in this case His Lordship doth conceive the true intent of the will to be, that the estates should be secured, as far as the rules of law will admit, to the issue male of the respective devisees, and that it was designed to be as strict a settlement as possible by law."

The same rule is well expressed by a modern text-writer (Mr. *Jarman*) in these words (1): "In these cases the direction to convey, or settle, is considered merely in the nature of instructions, or heads of a settlement, which are to be executed, not by a literal adherence to the terms of the will, which would render the direction to settle nugatory, but by formal limitations, adapted to give effect to the purposes which the author of the trusts appears to have had in view."

The most familiar instances of the application of this rule are to be found in cases arising under articles, or contracts, for a settlement to be made upon marriage. Words may be used which, technically construed, would imply that the issue of the marriage should be left to the chance of taking by descent an estate of inheritance vested in the parent; yet so strong is the evidence, arising out of the occasion of the contract, of an intention to give to the issue a provision independent of their parents, that, as a general rule, limitations will be introduced into the completed settlement giving a life estate to the parent, and estates by purchase to the issue. This is not because there is any rule of law applicable peculiarly to marriage articles, but because in such documents, *res ipsa loquitur*, the occasion itself testifies what the paramount object of the parties must have been.

What is the general intent and purpose of the person or persons creating the trust, or giving the instructions or directions, must in every case be ascertained from a construction of the whole of the instruments, and of any writings to which it refers, with such

(1) *Jarman* on Wills, vol. ii. ch. 36, p. 253.

knowledge, on the part of the Court, of the surrounding circumstances as the creator or creators of the trust must be supposed to have possessed.

It appears in the present case that the testatrix, some four years before the date of the codicil now in question, had made her will containing a full and detailed disposition of all her real and personal estate:—[His Lordship stated the will and codicil.]

When some four years afterwards the testatrix made her second codicil to this will, it does not appear from any expressions used by her that she entertained the desire, as far as her own personal preferences were concerned, to make any change among the children of her sister who were to enjoy, or any change in the order in which they were to enjoy, her property. But an event of considerable consequence to her family had just occurred. Lady *Amherst* was herself childless, but Lady *De la Warr* had several sons, and the Crown had conferred a barony (the Barony of *Buckhurst*) on Lady *De la Warr*, and, in order that this peerage might be the foundation of a second family, had limited it to Lady *De la Warr* for life, with remainder to her second son *Reginald* and the heirs male of his body, with similar remainders to her third, fourth, and fifth sons, and the heirs male of their respective bodies, with a proviso that if any of these sons or their issue should become Earl *De la Warr* the new peerage should shift to the next younger son, or his issue.

Whether this proviso is valid or invalid need not and cannot now be considered. The intention of keeping the peerages distinct, if it could be done, is obvious.

The grant of this *Buckhurst* peerage was, in substance, contemporaneous with the second codicil. The letters patent bear date the 27th of April and the codicil which recites them is dated on the 3rd of May, 1864.

It is the grant of this peerage which alone is assigned by the testatrix as the cause of the change in her testamentary disposition. It was in order to furnish a provision for the dignity created by this grant that she was willing to place in abeyance her own personal predilections, excluding a son of her sister whom she had included and placed first in her will, and, on the other hand, including and placing first one whom she had in her will altogether

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excluded. It was her anxiety that this provision should not be defeated by reason of accident which led her to execute a temporary and provisional instrument, rather than wait for those formal deeds which were stated to be in preparation. And putting aside for the moment any verbal criticism on the precise words used in the mandatory clause, I cannot doubt that the general intent and purpose announced by the testatrix in the recitals of her codicil is that of a desire to attach her property to this new and separate peerage, in an apt and formal method of law, so as to make the property a provision for the peerage.

But any Court on which was cast the duty of giving effect to this purpose would, at the very outset, have to consider the peculiar character of the dignity to which the property was to be attached. It is a peerage, passing from holder to holder, inalienable by any holder, or by any number of holders in succession. In the patent it is limited to Lady *De la Warr* for life, not because it was desired to give to her a smaller amount of interest, or to place her in a less favourable position than subsequent holders, but in order that the peerage might be made to pass from her to her second son. It is limited to her second and younger sons, and the heirs male of their bodies, in order to indicate compendiously the course of succession, and not in order to confer any power of disposition, or to invest the dignity in the person of a son with any higher attribute than when enjoyed by the mother. Each holder has the dignity for his life only. If, therefore, a Court, proposing to attach the property to the peerage, and adverting to the limitations of the peerage "for life," and to a son, "and the heirs male of his body,"—words which in the peerage are introduced for the purpose and with the effect I have described—were to settle the property under limitations expressed in the same way—limitations which in the case of property would have a wholly different effect and consequence, and, therefore, a different meaning—that Court would, in my opinion, be adhering, indeed, to the letter, but would be wholly violating the spirit of the trust it was proposing to execute. In the present case a settlement servilely following the words of limitation of the peerage would, in place of attaching the property as a provision for the peerage, constitute the second son of Lady *De la Warr*, as regards power of disposition, absolute

owner of the property after the death of his mother, a lady advanced in life at the date of the codicil, and would enable him, even during her lifetime, to alienate it from his own issue *ad infinitum*.

If, therefore, the codicil had done no more than express, as I think it clearly does express, an intention of making provision for the peerage, and a direction to settle the property for this purpose on trusts as nearly as possible corresponding with the limitations of the peerage, I should have been of opinion that this was a trust to be executed by limiting estates in strict settlement to the second and younger sons of Lady *De la Warr*. The object of making provision for the children of a marriage, and the object of making provision for the holders of a peerage, would appear to be so analogous that it would be the duty of the Court in the latter, as in the former case, to prevent, as far as possible, the defeat of this object.

But the codicil will, as I think, be found to contain in the details of its phraseology expressions strongly confirmatory of this conclusion. The testatrix, in referring by way of recital to her will, a will which, as we have seen, was made on the principle of a strict settlement, describes it as a devise "in a course of entail;" and she directs the settlement under the codicil to be made to correspond as nearly as may be with the limitations of the peerage "in a course of entail," words which may have some reference to the change to be made in the order in which her nephews were to take, but which also strongly indicate to my mind that the new settlement and the old were to be *ejusdem generis*. Moreover, the property was, in the language of the testatrix, "to be settled," "deeds for carrying into effect the settlement" were to be prepared, the settlement was to be effected "in such manner and form, and with all such powers, provisoes, declarations, and agreements, as the trustees should consider proper," and "counsel" were to be, or might be, consulted on the subject. All this is intelligible, and would be necessary in the case of successive life estates and estates of inheritance, but would be scarcely so if the first peer was to become, as regards his own issue immediately, and as regards all other persons on the death of his mother, the *dominus* of the property. Farther, the settlement was to be made "to correspond as far as may be practicable with the limitations of the

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barony." "To correspond," does not usually, or properly, mean "to be identical with," but "to harmonize with," or "to be suitable to;" and the words "as far as may be practicable," although they may include a reference to the difference to be observed in the limitation of real and leasehold or personal property, appear to me to find their much fuller and more appropriate explanation when read as a recognition of the difference which must always exist in substance between the limitation of a dignity and the limitation of property of any and every tenure.

I am unable to accede to the argument that the protection to the property arising from the life estate of Lady *De la Warr* ought to be a sufficient answer to a demand for the application of the ordinary rule to which, at the commencement of these observations, I have referred. The first persons in the succession requiring protection would be the issue of the first baron; and if he is to be made tenant in tail his issue may be entirely excluded by him, notwithstanding the preceding life estate. If in marriage articles the estate of the father of the intended husband were contracted to be settled on the husband, and his issue or heirs male, reserving a life estate to his father, the Court of Chancery would not, in my opinion, hesitate, merely by reason of this preceding life estate, to secure estates by purchase to the children of the marriage.

The next question which arises upon the settlement is, whether the tenants for life should be unimpeachable of waste. It appears to me that under the very wide words in the codicil, which directs the settlement to be made "in such manner and form, and with such powers, provisoes, declarations, and agreements as the trustees shall consider proper," this is a question which is in the discretion of the trustees, or of the Court to which the trustees have now handed over their duty. In the settlement made by the will of the testatrix, the tenants for life are made unimpeachable of waste, and although this will is revoked, and its provisions are in no way binding on the trustees, yet I think (especially having regard to the fact that it was revoked for a special and limited purpose only) its provisions ought not to be disregarded, and that they will justify the limitation of life estates in the new

settlement with the same provision as to waste as was given by the will.

The next question is as to the powers of jointuring and charging portions. On this subject I should be unwilling to lay down any general rule, or to suggest that any of the cases which have been referred to were otherwise than rightly decided. I cannot, however, think that if an executory instrument, on its proper construction, authorizes the insertion of powers of jointuring and portioning, the absence of any mention of amount ought to be an insurmountable difficulty. Nor, in my opinion, should powers of this kind, which are for the honour of the whole settlement, and which may come to be enjoyed by any of the beneficiaries, be looked upon as a favour to the first tenant for life, in contradistinction to his successors. In the present case I cannot doubt that the words of the general direction given to the trustees, and to which I have already referred, are quite large enough to include these powers; nor do I think that if the trustees had executed a settlement containing them a bill could have been maintained to have them expunged. The testatrix had inserted such powers in her will. It cannot, I think, be doubted that they would have found their place in the deeds which she states were to be prepared; and, as regards the amounts of jointures and portions, although, as I have said, the provisions of the revoked will are not binding on the trustees, their discretion would not, in my opinion, be wisely exercised if, without some specific reason, they were in the new settlement to depart from the amount so fixed. I think, therefore, no such specific reason being suggested, powers of jointuring and charging portions should be given to the tenants for life to the same extent as in the original will.

Differing on these points, as I am reluctantly compelled to do, from a judgment for which I entertain a most sincere respect, it is satisfactory to find, on the one hand, that there is no principle or rule of law in controversy, but only the proper construction of an imperfect and inartistic codicil; and, on the other hand, that had the Vice-Chancellor been able to arrive, as I think we ought to arrive, at the conclusion that tenants for life might be made unimpeachable of waste, and be furnished with powers of jointuring and portioning, some, at least, of the inconveniences which he saw

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in a strict settlement would, as I understand the judgment, be removed.

The only question remaining is, as to the form of the shifting clause; and on this I own I have felt some difficulty. What judgment may hereafter be passed as to the validity of the shifting clause in the peerage, should the events arise in which it might come into operation, we cannot anticipate. We must, however, in my opinion, assume that the testatrix had present to her mind the clause as it exists in the patent; that she had no doubt as to its validity; and that her desire was that her property should be made to shift in the manner and on the event described. It is on this principle that the shifting clause in the draft settlement, as now settled, has been prepared, and the clause in that form is in strict conformity with the direction of the testatrix, and appears to me to be correct. It might, indeed, be suggested (and this is what raised some doubt in my mind) that the desire of the testatrix having been to attach her property as an endowment for the peerage, the property should not be allowed to shift unless the peerage shifted, and thus that the validity and operation of the shifting clause as to the property should be made dependent on the validity and operation of the shifting clause as to the peerage. But I think the view, though plausible, would be fallacious. The testatrix designed to endow the peerage, but she designed to endow it as a separate peerage, kept by means of the shifting clause distinct from the *De la Warr* peerage, and from such property as the latter might be furnished with. She has not indicated any intention, that I can discover, to attach her property to the peerage, except as a distinct dignity. What wish she would have expressed, what disposition she would have made, had she been requested to anticipate the *Buckhurst* barony uniting with the Earldom of *De la Warr*, we do not know, nor do her general intent and object, as I have endeavoured to represent them, appear to me to cover this contingency. Under these circumstances I think the only safe course is to insert in the settlement, as has been done, a shifting clause the same, *mutatis mutandis*, as that contained in the patent.

My Lords, I have placed in the hands of my noble and learned friend on the woolsack declarations which I will venture to suggest

to your Lordships should be made to accompany the Order of this House on remitting this case to the Court of Chancery.

Order reversed, and cause remitted to the Court of Chancery.

The following Order was afterwards entered on the Journals:—

It is Ordered and Adjudged, by the Lords spiritual and temporal, in Parliament assembled, that the said Order of the Court of Chancery, of the 23rd of November, 1867, complained of in the said appeal, be, and the same is hereby reversed: And it is Declared, First, that the estates and property devised by and now subject to the trusts of the second codicil to the will of the testatrix *Mary* Dowager Countess *Amherst*, ought to be settled and limited in a course of strict settlement to the second and other younger sons of *Elizabeth* Countess *De la Warr* for their respective lives, without impeachment of waste, with remainder to their respective first and other sons in tail male, in the order and succession mentioned in the letters patent of the 27th of April, 1864; and that the leasehold estates and premises, and the statues, pictures, books, household goods and furniture, chattels, and effects comprised in and now subject to the trusts of the said codicil ought to be settled on and for such trusts and purposes and in such manner as will best and nearest correspond with such course of strict settlement, and so that the said statues, pictures, books, household goods and furniture, chattels, and effects may go with the mansion-house of *Knole* as or in the nature of heir-looms, according to the uses and limitations of such mansion-house, so far as the rules of law and equity will allow, but not to vest in a tenant in tail taking by purchase and dying under twenty-one years of age without leaving issue inheritable under the entail; Second, that the settlement ought to contain powers of jointuring and charging portions for younger children to the limits contained in the will of the testatrix; Third, that in the settlement there ought to be inserted a shifting clause in the words contained in the settlement mentioned in the certificate of the Chief Clerk of His Honour the Vice-Chancellor, dated the 20th of June, 1867; Fourth, that the costs of all parties, as between solicitor and client, of this appeal ought to be provided

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out of the estate. And it is farther Ordered, that the cause be remitted back to the Court of Chancery, to do therein as shall be just, and consistent with these declarations and this judgment.

Lords' Journals, 16th May, 1870.

Solicitors for the Appellants: *Pemberton, Meynell, & Pemberton.*
Solicitors for the various Respondents: *Nicholl, Burnett, & Newman; Cope, Rose, & Pearson; Freshfields.*

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March 10, 11, 14, 15, 21; *May* 20.

THE SECRETARY OF STATE FOR INDIA . APPELLANT;

AND

W. ELPHINSTONE UNDERWOOD . . . . RESPONDENT

Madras Civil Service Fund—Excess—Refund—Power of Directors and of Subscribers.

A fund was created at *Madras* (originally by agreement among members of the Civil Service there) to accelerate retirements from active service by the grant of pensions to officials so retiring. The Directors of the *East India Company* joined in the scheme, and undertook to provide one-half of the principal of the fund which was to supply the annuity. The subscriber was to supply the other half by paying a certain percentage on his salary during each year that he continued in the service. He might so continue a greater number of years than was necessary to make his payments equal to the one-half of the principal money. There was a resolution inserted in the rules of the subscribers (Rule 16) to the effect, that if the contributions of any subscriber should be in excess of the half-value, such excess should be refunded. The Directors of the Company always objected to this rule, but allowed it to be acted on for some years, until at length they declared in a dispatch that "the practice of refund hitherto allowed *should be abrogated*," and a special general meeting of the subscribers was called to consider this matter, the circular calling such meeting declaring that "It will be observed that the Honourable Court" [of Directors] "has *ordered* that the practice of refunding the excess be discontinued." A large majority declared in favour of accepting the revised rules as prepared by the Directors, from which the words of the 16th rule as to refunding were omitted:—

Held (*diss.* Lord *Hatherley*, Lord Chancellor), that this act of the majority, even under the circumstances under which it took place, was binding on the whole body, and that no excess created by payments made after that date could be made the subject of a refund.

THIS was an appeal against a decree of the Court of Chancery by which the Respondent had been declared entitled to a refund

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of a sum of money paid by him in excess of his required subscription to the *Madras Civil Service Fund.* That fund was originally constituted by subscribers who were in the Civil Service of the *East India Company*, and had for its object to provide annuities for officials who retired from the service after twenty-five years' service. The Directors, believing the object to be beneficial to the interests of the Company, as well as to those of the civil officers who retired, joined with the subscribers in promoting that object, and undertook to contribute half the principal sum on which the grant of each annuity was to be founded. The official was himself to pay a certain sum out of his income to make up his share of contribution—one-half—to the formation of the principal, and he was to pay this proportionate sum during each year he continued in office. The grants of annuity were to be limited in number for each year, and an official might thus (by the regulations of the fund, as also he might by his own choice) pay for a greater number of years than was necessary to constitute the one-half of the principal money. The Respondent had done so, he had paid more than his half of the principal before the resolution rescinding the rule for a refund was passed, and his resignation was not tendered and accepted till a long time afterwards, and therefore, when his resignation of office was tendered and accepted, and his annuity was granted, he claimed to be entitled to a refund of all the money which he had paid in excess. The question depended entirely on the construction to be put on the acts and resolutions of the subscribers to the fund, and of the Directors of the *East India Company.* Vice-Chancellor *Wood* had thought that on a proper consideration of these acts and resolutions Mr. *Underwood* was entitled to a refund of the excess. This appeal was against the decree made by His Honour on that point.

Sir *R. Palmer*, Q.C., Mr. *Forsyth*, Q.C., and Mr. *E. Macnaghten*, appeared for the Appellant.

Mr. *Anderson*, Q.C., Mr. *Huddleston*, Q.C., Mr. *Cecil H. Russell*, and Mr. *Steele*, were for the Respondent.

The following cases were referred to, and are fully commented on by their Lordships in giving judgment: *Boldero* v. *The East*

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India Company (1); *The East India Company* v. *Robertson* (2); and *Davis* v. *The Trustees of the Madras Civil Service Fund* (3).

May 20. THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, the question in this case is, whether or not the Respondent, who had for many years been a subscriber to the *Madras Civil Service Annuity Fund*, but on the 1st of May, 1860, resigned his position in the service, and accepted an annuity of £1000, is also entitled to a refund of the excess of his accumulated contributions to the fund over and above one-half of the value of the annuity.

The case really rests upon a very few documents, notwithstanding the enormous mass of printed matter contained in the Appendix to the printed cases of the parties.

The *Madras Civil Service Fund* was formally constituted under two several deeds of 1814 and 1818, executed by the civil servants of the *Madras* Presidency, by which the fund was vested in trustees subject to the regulations in the deeds, and was in existence, therefore, before 1824, when the *Bengal Civil Service Fund* was formed. The *East India Company*, in a spirit of great liberality, contributed to the above funds in each presidency, the directors reserving to themselves certain controlling powers over the management.

In 1825 the Directors were desirous of remodelling the *Madras Civil Service Fund*. They proposed to bring it into greater conformity with the scheme of the *Bengal* Fund, but there were necessarily modifications to be made in providing for the interests of the old members of the existing fund.

The subscribers to the old funds were bound by the deeds of 1814 and 1818 to make certain contributions by way of percentage on their salaries, and by the provisions of those deeds the subscribers were entitled to an annuity of £600 after a residence of twelve years in *India*, and a contribution of 20,790 rupees. The *Bengal* plan required twenty-five years of service, of which twenty-two were to be spent in *India*. Thereupon, in his turn, the sub-

(1) 11 H. L. C. 405. (3) 12 Moo. P. C. 403, n.; see also 7 Moo. Ind App. 364, n.
(2) 12 Moo. P. C. 406.

scriber might retire on an annuity of £1000 per annum, provided his accumulated subscriptions which were credited to him, with interest, amounted to half the value of the annuity, or if he paid the difference. The accumulations were made up by an allowance on the part of the *East India Company* of interest at £6 per cent. upon the amount paid by means of an annual deduction, of £4 per cent. on his salaries and emoluments, which each civil servant had to pay to the fund.

The report of the trustees of the fund to the *Madras* Government upon the new scheme of the Directors, which is dated the 22nd of July, 1825, contains this passage:—"It is obvious that the subscribers to the civil fund cannot recede from their engagements to one another in order to avail themselves of a new fund to which they may give the preference." They proposed ultimately, on behalf of the existing subscribers, amongst other things, that they should be allowed to retain at any time the right of reverting to the old rules, if circumstances rendered it expedient for them to do so.

The Directors at first insisted that an option should be declared, once for all, as to whether existing subscribers would abide by the old rules, or adopt the new; but they ultimately gave way on that point.

No formal rules seem to have been drawn up, but the matter rested on a dispatch of the Directors to the *Madras* Presidency of the 10th November, 1826, referring to the *Bengal* dispatch of the 8th of December, 1824, establishing the fund there, and the acceptance of the terms with the modifications above mentioned, and certain other modifications of detail, by the subscribers to the *Madras* Fund. The Directors undertook to pay four annuities of £1000 a year each, and reckoned that they should have to make a contribution about equal to those made by the civil servants (paragraph 27, Dispatch 10th November, 1826).

It will be observed that every civil servant was by the regulations to contribute one-half of the value of his annuity by means of the credit given to him for his payments, with interest at £6 per cent. In the case of *Boldero* (1), it was determined that the words of the dispatch of the Directors of the 8th of December,

(1) 11 H. L. C. 405.

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1824, did not, as regarded the *Bengal* contributories, entitle any subscriber who might continue to subscribe after he had been credited with the half-value of his annuity to a refund of any over payment beyond that half-value. He was compelled to pay his contribution as long as he remained in the service, that is to say, until he accepted an annuity, but it had been thought that certain words in the dispatch, viz., "that he should pay one-half the value and no more," authorized him to demand a return of any surplus payment. Your Lordships held that such was not the true construction of the rule, and if the *Madras* Fund had remained in the position in which up to this time it had been, the same result would probably have followed, though there are some passages in the official correspondence that might, independently of the words I have quoted from the *Bengal* dispatch, have led to a different conclusion. For instance, on the 30th of January, 1828, the Directors, in acceding to the proposal that the old subscribers may retain their option of accepting an annuity, make their consent subject to an express proviso that subscribers shall not, if holding to the old fund, be allowed interest on their payments, nor any refund of an excess of payment beyond the sum payable for the annuity.

From whatever cause, however, it arose, there seems to have been an impression on the minds of the subscribers to the fund that a refund of any excess beyond the half-value of the annuity at the time of its acceptance would be allowed, and in 1838 a book was published and circulated by the trustees of the fund purporting to give, in a complete and formal shape, the rules of the *Madras Civil Service Fund.* They, in reality, embody the substance of the correspondence between the Directors and the Government, and the trustees of the fund, and it must be taken, I think, since the decision of the Privy Council in *Robertson's Case* (1), that those rules constituted the contract between the parties, and were binding both on the Directors and the subscribers up to the 17th of June, 1853, when it is alleged the rules were varied.

It is convenient here to consider the position of the several parties to the contract.

(1) 12 Moo. P. C. 400.

The formal deeds of 1814 and 1818 are deeds to which the civil servants alone are parties, and they recite the contribution which the Directors have been "graciously pleased" to make; but the Directors are no parties to the instruments, although the deeds recite that the sanction of the Court is required for changes and modifications of the rules in certain cases.

The letter of the Directors of the 8th of December, 1824, addressed originally to the Governor-General, with reference to the *Bengal Civil Service Fund* (containing a copy of rules proposed by a committee of the *Bengal* civil servants as to the fund), became, with certain modifications, the basis of the engagement of the Court with its civil servants at *Madras*. The Court seems to have acted in the exercise of its sovereign power both as regards liberal donations, which it was disposed to make to the fund, and also as to the superintendence which it exercised over the concerns of that fund.

The Directors required that of a committee of seven who were to manage the fund, two should be *ex officio* members (in *Bengal* four out of nine were official), and these two were to be the Chief Secretary of the Government at *Madras* and the Accountant-General, the other five were elected by the subscribers to the fund. Farther, the Directors required all their civil servants to contribute to the fund, and they insisted on their own sanction being given to any important alteration of the rules (as more fully mentioned afterwards), giving also an appeal to the Court on the part of those who might feel themselves aggrieved by any decision upon such matters.

In a letter of the 8th of December, 1824, the Directors (in the 61st paragraph) proposed to contribute whatever sum might be required, in addition to the contributions of subscribers, to enable the fund to grant such number of annuities as might be accepted under the prescribed regulations, not exceeding a certain number; and in the 62nd paragraph the Government of *India* was directed to receive the subscribers' contributions, and to allow interest at £6 per cent. on the balance belonging to the fund. And the Directors also prescribed an adjustment as to interest at the end of every five years; and at the end of twenty-five years they directed a revaluation of the annuities on the footing of experience, and the Company's contribution was then to be

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"finally limited to the sum which, when added to the contributions of subscribers and to the income derived from the accumulated balance, would make a total income equal to the grant of (in the *Bengal* case) nine annuities annually, according to the valuation which should be fixed."

In their dispatch to *Madras* of the 10th of November, 1826, they direct a similar adjustment to be made there every five and twenty-five years, expressly referring to the 62nd paragraph of the *Bengal* dispatch.

The Company, then, was no party to any of the deeds of the subscribers; but the Directors engaged to contribute to the funds raised by their orders, which compelled subscriptions of £4 per cent. on salaries and emoluments. In return, the Directors entered into engagements for contributing to the fund so as to provide for the payment of specified annuities.

To return to the rules of the *Madras Civil Fund*, published in 1838. I think these must be looked on in the same light as if they were contained in a deed of covenant between the civil servants bound to contribute to the fund, and sanctioned by the Court of Directors, who on their part must be taken, by their dispatches, to engage to observe those rules as between themselves and the contributors. They are, as far as is necessary to be referred to, the following:—

By Rule 5 those who remain under the old rules of 1818 are not to have a refund of any excess paid by them, beyond the sum necessary to secure their obtaining an annuity.

By Rule 6, the subscribers to the new plan are to pay £4 per cent. on their salaries and emoluments.

By Rule 8, the annuity is to be Rs. 10,000, or £1000 a year, after (by Rule 9) twenty-five years' service, twenty-two of them being in *India*, to be taken in seniority.

By Rule 11, at a convenient period before the 1st of May in each year those who are qualified are to be invited to signify whether they are willing to retire on an annuity. The annuities offered are not (Rule 13) to be more than four in a year.

By Rule 15, any civil servant may retire from the service when he has paid the half value of his annuity of £1000 a year, and wait for his turn without farther contribution.

By Rule 16, the annuitant, on taking an annuity, is to pay half of the value; "but should his contributions be in excess, the excess is to be refunded."

By Rule 22, a managing committee of seven is appointed, with two official members, viz., the Chief Secretary and the Accountant-General, the rest to be elected by the subscribers.

By Rule 25 the managers are to decide all matters connected with the management of the fund and the due execution of the rules, subject to control by a general meeting of the subscribers.

By Rules 20 and 21 provision is made for quarterly and special general meetings of the subscribers. A majority of three-fourths is required of those voting either in person or by proxy. "And upon all general questions involving any increase or diminution of the rate of contributions, or any essential addition to, or alteration in, the original rules and principles of the institution thus established, all subscribers in *India* were to be allowed to send in their votes by a written communication addressed to the managers, accompanied by a medical certificate of their inability to attend; provided that no decision upon such question should be valid or have any effect until sanctioned by the Court of Directors," to whom all parties aggrieved might appeal. Provisions are made for payment of the annuities.

The 31st rule directs the managers to pay over the amount of the annuity to the Government at *Madras*.

The 33rd rule refers to annexed tables for calculating the value of annuities, with power to revise the value, as experience and the fluctuations of interest should suggest, by a decision of a general meeting sanctioned by the Directors. Provision is also made for keeping an account with each subscriber, wherein he was to be credited with his payments, and £6 per cent. interest thereon.

These rules were acted on for many years upon the faith of the Directors adhering to their engagements contained in their dispatch to *Madras* of the 10th of November, 1826.

In 1834 a Mr. *Harris* accepted an annuity, and claimed the excess of his over-payments beyond one-half of the value of the annuity, to the extent of 2492 rupees. This was before the publication of 1838, and his claim was allowed, and entered yearly as a payment in the accounts of the trustees submitted to the subscri-

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bers, copies of which were transmitted to the directors down to the year 1853.

Between 1834 and 1851 nine other annuitants claimed and received over-payments according to Rule 16, one of them, Mr. *Dickinson*, to the amount of 46,589 rupees; another to an amount exceeding 30,000 rupees.

These circumstances, viz., the circulation of the rules in 1838, and the allowance in so many cases of the refund claimed under Rule 16, led the Judicial Committee of the Privy Council, in *Robertson's Case* (1), to hold the *East India Company* bound to allow that refund.

Now, in this state of things was it optional with the Directors alone at any time to hold their hands and say, of their own mere will, that they would no longer allow the refund? I think not.

Was it competent for the subscribers at a general meeting to pass a resolution that this refund should not be allowed for the future to any annuitant, so as to affect the right of a person to whose credit an accumulation exceeding the half-value then stood, and who had not yet had the offer of an annuity? I think not. The power of making general rules must surely be one of making rules that operate equally on all subscribers; as for instance, any general change in the rate of percentage, or of contribution, or the like. They could not by a majority have determined that all subscribers of ten years' standing should pay twice as much, or half as much, as those of five years' standing. They could not pass a resolution to credit every existing member with such a sum as should make the amount to his credit equal to that of the elder members. They could not, I think, with any more reason pass a resolution that all those who had at that time a right to stand next in a choice for an annuity should pay a fixed sum over and above their existing contributions, if their contributions amounted to exactly a moiety of the value. On what principle could they annihilate any existing excess above the moiety which had been justly credited to any subscriber, and which he was entitled to receive on taking his annuity? He might be within a fortnight of his option; he might be the only person in that case. What power could he have of controlling by his vote the action of those whose direct interest it would be to deprive him of his property?

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The position of the contributors has been likened in argument to that of a shareholder in a joint stock company bound by any resolutions passed whilst the contributor is a member. The difference in position, in the first place, is this: the payments are made by the compulsory direction of the Directors of the *East India Company*, but with a bargain at the same time, by those Directors, that they will compensate the subscriber by paying him whenever it comes to his turn, after twenty-five years' service, an annuity of £1000 a year for life, and also any excess of his accumulated payments over half the value of the annuity. Can the other subscribers (say three-fourths of the whole) who have not paid the half-value, pass a resolution that the remaining one-fourth who may have paid in excess shall be deprived of that excess.

The argument was put as high as this, and, indeed, required to be so. It was said *Robertson's Case* (1) only decided that *Robertson*, having declared his option to take an annuity, ceased to be a member of the institution, and, therefore, was no longer bound by any resolution that others passed after he had ceased to be one of their body. But take the case of the four or five gentlemen who, like the Respondent in this case, had overpaid the half-value at the date of the resolution, some of them not even having had the option of an annuity; the question is, could the majority, by resolution, deprive them of that which the institution and the *East India Company* had contracted to pay.

The Directors were, indeed, advised that the point was more doubtful as to the existing excess than with regard to payments made after the resolution, and especially after an option of taking the annuity had been offered, and they accordingly paid the existing excess without prejudice to the question as to legal right. But, for the reasons I have given, it appears to me plain that the Directors could not withdraw from their engagement, nor could the subscribers, by resolutions, bar the right at least to that existing excess. No rules, unless the expressions were insuperably the other way, would ever be so construed as to enable a majority having an interest directly opposed to the vested interest of a minority to confiscate that interest.

But how as to the future? It may be said the subscribers having

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an option to retire, would be bound by a rule denying, in future, a refund, so far as regards payments made subsequent to the rule, and that to hold otherwise would be to bind the fund so long as any subscriber *in esse* at the date of the rule may exist. I do not see that even such a consequence would necessarily be unreasonable, but I do not think that the consequence would flow from the decision now under appeal.

Those who have not yet paid in excess might all be held to be in an equal position, regard being had to their chances of life, and the doubt whether they would ever make any over-payment at all, upon which alone the question of refunding could be of any importance, whilst those who have at the date of the rule made their over-payments have an existing right to the excess to be realized whenever the annuity is accepted, and a certainty that every fresh contribution on their part is paid into an accumulating account for their benefit. They are, therefore, directly struck at by any intermeddling with the question of refund in a manner wholly distinct from that of the other contributors. In other words, I think a rule might well be passed that, "saving the rights of all who have contributed in excess of the one-half value of the annuity," no future refund shall be allowed. If the analogy of a joint stock company be assumed, say, for instance, a mutual assurance company, whose deed might authorize a majority of three-fourths to bind the company, I do not think that a fundamental original rule, giving to all assurers of twenty-five years' standing a bonus equal to all the subsequent contributions, could be rescinded by a majority against the votes of those who continued members after twenty-five years of subscription on the faith of the original rule, or that the company could say to such members, "You must either retire or lose your money."

What has in reality occurred in this case has not been anything so unjust on the part of the subscribers as to out-vote the few members entitled to the benefit of the rule for a refund, but the *East India* Directors have, by their own sovereign authority, cancelled that rule, and have required the subscribers to remodel their rules, with a statement that the abrogation of the rule as to refund is the *sine quâ non* of the Company continuing its contributions.

The subscribers have submitted to this duress, and have sanc-

tioned the rules by accepting them with the modifications imposed. I do not think the contributors who were entitled to the refund could be deprived of it either by the will of the Directors or by the vote of the members. A few extracts from the papers will, I think, establish the real position of the parties.

In a dispatch of the 6th of February, 1850, of the Directors to the Governor of *India*, a copy of which was sent to *Madras*, they point out the difference existing on the point now in question in the rules at *Bengal*, as contrasted with *Bombay* and *Madras*, the first not allowing refund. They set out an extract from a dispatch of the 1st of September, 1841, in which the Directors had then recognised the refund as being in accordance with the regulations of the fund. They say "that *Bengal* did not approve of the system, and though they admit that they have not hitherto objected to it in *Bombay* and *Madras*, they now intimate their objection, and say they think the fund will have no claim on the Directors for a fixed number of annuities per annum if they continue the practice."

This dispatch was brought before the trustees of the fund; they drew up a paper on the subject, and summoned a meeting of members of the service for the 4th of July, 1850, to consider the question of abrogating the practice of refund. The meeting resolved to adjourn the question till a paper had been prepared stating the circumstances that occasioned the difference between the *Bengal* and the other funds, and had been circulated amongst the members of the service.

The trustees drew up a very able paper accordingly. They there, amongst other things, point out that the reason urged by the Directors against the practice, viz., that it encouraged old members to remain in the service, did not in fact exist at *Madras*, the limited number of annuities being always taken up when vacant, which was not the case in *Bengal*, for that their oldest servant was of the date of 1814, instead of, as in *Bengal*, of the date of 1794. They farther specially pointed out that the Company's servants have always "considered themselves bound, in introducing any change of system, to guard and save all existing interests, an obligation which they honourably fulfilled on the occasion of the change made in 1825."

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On the 26th of September, 1850, the members met at a general meeting, and by sixty-six votes to eight those present decided against abrogating the practice of refund. Twenty members more at the out-stations came to the same conclusion, so that the votes were eighty-six to eight against its abrogation. This was communicated to the Directors, and some correspondence passed on the subject. On the 20th of May 1851, the Directors, by a dispatch to the Government of *Madras*, submit to the resolution, but resolve to reduce the interest to £4 per cent. on the excess. This they were clearly empowered to do by the original proposition as to revising the rate of interest.

But on the 27th of August, 1851, the Directors sent a dispatch to the Government of *Madras*, in which they say: "Refunds of subscriptions beyond one-half of the value of the annuities are in no case to be made at the expense of the Government." On the 29th of April, 1852, the trustees remonstrate, saying it will affect very few individuals, but send a letter of Mr. *Elliot*, "as a startling instance of the distress which will be occasioned to a few of those persons in the service in the event of the required effect being given to *your Honourable Court's late order*." In the 19th paragraph of the same letter the trustees say that, "taking the small number of subscribers who are or can become entitled to refund, and the chances of lapse, it is hardly worth while to depart from the practice, and distress for so small a sum those servants who had so long and faithfully discharged those important duties with which they have been intrusted."

On the 20th of October, 1852, the Directors meet this remonstrance with a distinct *order*, contained in a dispatch to the *Madras* Government, the first part of which was written before, and the latter after, the Directors had received the statement by the trustees of the 5th of May, 1852. They say that the rules as to refunding never received their sanction, and end the paragraph thus: "We regard with strong feeling of disapprobation the whole of this most irregular proceeding, and we repeat the desire we have recently expressed, that no refunds be upon any account allowed in future." There can be no misunderstanding of the word "desire." It was a command as expressed in peremptory language in the dispatch of the 27th of August before cited; but at the

end of the dispatch the Directors, in paragraph 30, say "they have just received the statement of the trustees as to refunding," and adhere to the decision already communicated, and decline to accede to the request of the trustees that they may continue to refund accordingly. This is clearly so understood by the *Madras* Government, who enclose this letter to the trustees of the fund, in a minute of the 10th of December, 1852, with this direction: "The trustees will give their particular attention to paragraph 19, in which the Honourable Court disallowed in future upon any account refunds on retirement."

The matter here, then, was concluded as regards the Company. If the Directors had power to disallow refunds they had expressed their orders, and it does, I confess, appear to me idle after this to suppose that any vote of the contributors, as of a joint stock company, was either sought for or expected; the refund would doubtless have been disallowed with or without such a vote.

The Directors, however, appended to the last dispatch a new set of rules, which they desired the trustees to submit to the subscribers. These rules contain two matters on which the Directors have given their peremptory orders—the one a rule abolishing refunding, the other a rule directing the fund of 1818 to be kept distinct from that of 1825. Accordingly, on the 2nd of May, 1853, the trustees sent a circular with a draft of the new rules, in which they speak to each subscriber (in paragraph 4) as follows: "It will be observed that the *Honourable Court* has *ordered*—1. That the fund of 1818 be kept wholly distinct from that of 1825. 2. That the practice of refunding the excess of the accumulated amount of subscriptions above the half-value of the annuity be discontinued for the future." They proceed to state the other rules as *suggestions*, and then they submit the whole to the consideration of the subscribers, pointing out carefully all variations from the rules of the printed book of 1838, especially that in the 16th as to refunding.

On the 17th of June, 1853, the subscribers met, and by ninety-two votes of persons present, and sixteen from out-stations, making 108 as against two dissentients, passed the rules. The Respondent is one of the persons concurring in the vote. Mr. *Elliot*,

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who had accepted an annuity, wrote a letter, saying he should have voted in favour of the new rules had he not thought it might damage his claim under the existing constitution of the fund to a refund; in order to avert such a construction, he says he is compelled to absent himself, and his letter is read at the meeting.

It does not appear to me that the meeting had the slightest intention to do anything more than lay down rules for the future, submitting to the orders of the Directors as to the refund, assuming it to be within the competency of the Directors, and without supposing their doing so would confer, or, indeed, that they were invited to confer, any authority on the Directors which they did not possess. No possible reason can be assigned for the total change of mind of almost the whole body of subscribers within two years, and most especially of the persons entitled to the refund on accepting an annuity, and of the trustees who had in vain made their powerful remonstrance.

That the trustees, years afterwards, supposed that they acted simply under orders, they subsequently shewed in their report to the meeting of the 9th of January, 1857, where they state the result of *Davis's* suit. They say that the Plaintiff sought to recover the excess of payment made by him beyond the half-value of his annuity; and as "they were precluded by the *orders of the Honourable Court* (meaning the directors) from recognising his claim," he had filed his bill.

The Appellant occupies the same position as that which was occupied by the Directors. Being, therefore (as I am), clearly of opinion that the Directors had no power of themselves to retreat from the rules under which the refund had been authorized (supposing them, as I do, from the decision in *Robertson's Case* (1), to have acquiesced in those rules), and being also of opinion that the majority of three-fourths of the subscribers could not *ex post facto* pass a rule depriving any person once entitled to the benefit of that rule from availing himself of it, and being satisfied moreover that no such majority ever affected to pass any such rescinding rule, but that the meeting of 1853 simply acquiesced in the orders

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of the Directors, so far as those orders could bind them, I adhere to the view according to which I originally decided this case, and I think the appeal ought to be dismissed.

It is a maxim of law, acted on in every Court, that he who holds out to another expectations to induce him to act, upon which that other does accordingly act, is bound to make good such expectations. And I confess it appears to me that the maxim should be strictly applied in a case where compulsory payments have been exacted and submitted to on the faith of their being laid up in store for the contributor if he should live to demand them. I feel strongly, as did the trustees of the fund, that good faith should be kept with all contributors for the past; they insisted that this should be done with regard to the contributors of 1818, and they urged the Directors to deal in this spirit with "the few old and faithful servants whose contributions had so largely swelled the fund of 1825."

LORD CHELMSFORD stated the circumstances of the case very fully. His Lordship having referred to various documents connected with the institution of the fund, mentioned the rules agreed to at a meeting of the subscribers, which rules were to be found in a pamphlet published in the year 1838. By the 16th rule it was provided that "any subscriber who may accept the tender of an annuity of £1000 shall be required, to entitle him to such annuity, to pay to the institution, previous to the date at which the annuity is to commence, the difference between one-half of the actual value on his life and the accumulated value of his previous contributions, in case the latter shall be less than the former, but should the contribution be in excess such excess shall be refunded." The 30th rule was in these terms: "All questions proposed at a general meeting shall be determined by three-fourths of the members present, or voting by proxy, and upon all general questions involving any increase or diminution of the rate of contribution now fixed, or any essential addition to or alteration in the original rules or principles of the institution which are now established, all subscribers in *India* not able to attend shall be allowed to deliver their sentiments and votes by a written communication, provided that no decision upon such question shall be valid or have any effect

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until sanctioned or approved by the Court of Directors." His Lordship proceeded to say:—

In the rules of the *Bengal Civil Fund* there is no provision for a refund of the contributions in excess of the half-value of the annuities, as in the 16th rule of the *Madras* Fund. The Appellant asserts that this passage as to refunding was no part of the original rule, but was either interpolated or erroneously inserted in the pamphlet of 1838. The Directors themselves, in a letter to the *Madras* Government of the 20th of October, 1852, say, "It would appear that in 1838 the trustees inserted in a new edition of the rules a clause to the effect that if the contributions of any subscriber should be in excess of the half-value, such excess shall be refunded. But this clause, so far as we can ascertain, was never submitted to the subscribers, as required by the rules. It certainly never received our sanction; it was not even reported to us, and yet it has been acted upon as if it had been duly authorized."

This last fact of the rule of refund having been acted upon, leads me to the conclusion, notwithstanding the statement of the Directors to the contrary, that it could not have been an unauthorized insertion. Such a material addition to the rules could hardly have escaped attention, and would have led to immediate correction. And it is a strong circumstance in favour of the correctness of the version of the rules in the pamphlet of 1838, that before the date of it the rule had been acted upon in no less than five instances, in accordance with its terms. The Directors themselves state that since the institution of the fund of 1825 there have been nine cases in which the refund has been granted. The refunds were allowed, not by the Directors but by the trustees of the fund, but they were brought to the knowledge of the Directors in the accounts which were regularly laid before them.

And it is clear that the Directors must have considered that the rule of refund was one of the rules for the regulation of the fund, because, instead of resolving, *proprio marte*, no longer to permit it to be acted upon, they sent a dispatch to the Governor-General of *India*, on the 6th of February, 1850, stating that the rule of refund was in their opinion disadvantageous to the service and to the Government, and they were desirous of having it altered. To the *Madras* Government the Directors wrote on the same day,

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"We have expressed our opinion to the Government of *India* of the disadvantages attending the refunding system, and we desire that you will adopt such measures in co-operation with that Government as may appear best calculated to induce the Civil Service at your Presidency to abrogate it." But a third letter of the 6th of February, 1850, from the Directors to the Governor-General, appears conclusively to shew that the rule of refund was one of the original rules of the *Madras Fund*, and not one irregularly introduced. In this letter the Directors say, "We admit that we have hitherto not objected to the rules which were passed (at the Presidencies of *Madras* and *Bombay*) allowing the system of a refund, but we are now of opinion that the operation of such rules is alike disadvantageous to the service and to Government." And they desire that "the Governor-General will give the subject his best consideration, with a view of procuring an alteration in the rules of the Civil Service Annuity Funds at *Madras* and *Bombay*, in order that the principle of refunding may be abolished, and that the operation of the funds at the several Presidencies may be uniform on the point herein specified."

The attention of the trustees of the fund having been directed to the subject, they called a special meeting of the subscribers to record their votes upon the proposition involved in the Directors' dispatch, viz., "that the practice of refund hitherto allowed be abrogated;" and a statement of the circumstances under which the amount subscribed in excess of the half-value was refunded on the acceptance of annuities was circulated amongst the subscribers to the fund. The meeting took place on the 26th of September, 1850, when there were only eight votes in favour of discontinuing the practice of refunding, and eighty-six against it.

After this defeat the Directors did not at first appear to think that the right of refund was not a rule of the *Madras* Civil Service, and that the subscribers had not the power to retain or to abrogate it at their pleasure; for in a letter from the Court of Directors to the *Madras* Government of the 20th of May, 1851, they inclose extracts from minutes of consultation, the first paragraph of which is in these terms: "The proposition for abrogating the rule of the *Madras Civil Service Annuity Fund*, which provides for refunding to its members, on becoming annuitants, the amount which they

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have contributed in excess of half the value of their annuities, having been circulated for the votes of the service, and rejected, we consider it necessary to lay down a principle for regulating the interest to be allowed on such excess when it occurs." They therefore direct that 4 per cent. annual interest only be allowed instead of 6 per cent. on the subscriptions of members in excess of half the value of their annuities.

But in October, 1852, the system of refunding appeared to the Directors so calculated to weaken the fund, and ultimately to destroy it, that a new light seems to have broken in upon their minds, and instead of admitting, as before shewn, that the refunding of the excess above the half-value of the annuities was part of the original rules, they take the ground already adverted to, that the passage as to refunding was an unauthorized interpolation.

This new view of the subject will account for the altered tone of their dispatches. In their letter to the *Madras* Government of the 20th of October, 1852, they say: "We regard, with strong feelings of disapprobation the whole of this most irregular proceeding; and we repeat the desire that we have recently expressed, that no refunds be, upon any account, allowed in future." And in a subsequent paragraph of this letter they add: "Since the foregoing paragraphs were written we have received your letters inclosing representations from Mr. *D. Elliot* and the trustees of the fund, upon the subject of the orders contained in our dispatch of the 27th of August, 1851, regarding the practice of refunding subscriptions in excess of the half-value of the annuity. We must adhere to the decision already communicated, and must decline to accede to the request of the trustees that these refunds may continue to be allowed at *Madras*."

To this dispatch a draft of rules was appended, which the Directors requested the managers of the fund to submit to the votes of the service. Amongst these proposed rules there was one, the 8th, in substitution of the 16th of the original rules, from which the passage in that rule as to the refunding the excess of contributions was omitted.

In pursuance of the directions contained in this dispatch the trustees called a special general meeting of the subscribers to the fund for the 17th of June, 1853. On the 2nd of May, 1853, before

the meeting, the trustees sent to each of the subscribers a circular, in which they state: "It will be observed that the honourable Court has *ordered* that the practice of refunding the excess of the accumulated amount of subscription above the half-value of the annuity be discontinued for the future, and they regret the conclusion at which the honourable Court has arrived in peremptorily interdicting the grant of refunds for the future." To this circular was appended a summary "of the present rules compared with the proposed new rules," in which the 16th of the original rules was set out at length, and also the rule proposed instead of it. At the meeting of the 17th of June, 1853, the Respondent, Mr. *Underwood*, was in the chair, and upon the votes being taken, the result was a majority of 106 in favour of the revised rules.

There can be no doubt that the change of the system of refunding the excess of contributions was within the competency of a general meeting of the subscribers, and that this change was involved in the revised rules in favour of which the majority voted.

The learned counsel for the Respondent, upon being pressed to state whether they regarded the rule of refund as having been abrogated or not, had some difficulty in giving a direct answer; but they contended that, at all events, the subscribers had no power to abrogate the rule as against the Respondent. They asserted that the question of refund was never submitted to the consideration of the meeting, but that their vote upon it was peremptorily dictated to them by the Directors; and they pointed out the difference in the language of the Directors as to refunds, and as to the submission of the proposed new rules to the votes of the subscribers. They also observed upon the question of the abrogation of the rule of refund having been submitted to the subscribers not three years before, when it was negatived by a large majority; and upon the improbability of its adoption, when the same question was again brought before the same, or nearly the same, body of subscribers so soon afterwards. And they argued from these circumstances that the subscribers could have had no idea that this question was before them upon the proposed new rules, and that they were, in fact, ignorant that they were voting upon the subject.

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If the question was really submitted to the meeting, although so clouded by the form in which it was brought before it, that the persons present voted as it were in the dark, what is to be the result of a vote thus ignorantly given? Is it to go for nothing? or upon the representation of the subscribers that they were in ignorance what they were voting, is the part of the revised rules in question to be taken not to have been carried? But, in truth, there could not or ought not to have been this ignorance that the question of refund was to be brought before the meeting. The attention of the subscribers was distinctly called to the subject by the circular of the trustees of the 2nd of May, 1853, to which, although not in evidence, your Lordships, by the consent of both parties have referred. It may be that this proposed alteration of the rules might escape the notice of anyone not reading the circular attentively, but it was explained to every subscriber who desired to acquaint himself with the effect of these new rules.

With regard to the trustees putting before the subscribers the orders of the Directors upon the subject of refund as obligatory upon them, they knew, or ought to have known, what their rights as subscribers to the fund were. And recent experience might have instructed them that the Directors had admitted their power over this rule of refunding. There were present at the meeting of the 17th of June, 1853, some who were also at the meeting of 1850, and who could not have forgotten that the question of abrogating the rule of refund had been then submitted by the Directors to the subscribers for their consent, which they had almost unanimously refused.

But the question of refund was discussed at the meeting of June, 1853, and it must, therefore, have been involved in the consideration of the proposed rules, otherwise the discussion would have been foreign to the business of the meeting, which was called to consider whether the rules should be adopted or not. At the meeting a letter was read from Mr. *Elliot* to the chairman, stating his wish to attend the meeting in order to support the adoption of the new rules, "but for the apprehension" (as he writes) "that I might thereby be considered as compromising my own claim under the existing constitution of the fund to the repayment of the amount which shall be at my credit when I accept an annuity,

in excess of its value." And the Respondent, Mr. *Underwood*, in an affidavit in the cause states that the subject of the refund of the excess beyond the half-value of the annuities to subscribers was discussed at the meeting in consequence of Mr. *Elliot's* letter, which was then recorded, and entered upon the minute of the proceedings.

Therefore, whether knowingly or ignorantly, mistakenly or intentionally, the whole of the new rules were voted by a majority, and necessarily carried with them the abrogation of the rule respecting refunds.

The rules as altered by those of the 17th of June, 1853, are now the governing rules of the *Madras Civil Service Fund*, therefore the question of refund as to those who became subscribers after that date is set at rest. The only consideration in this case is how the adoption of these rules by the subscribers affects the rights and interests of Mr. *Underwood*.

The question of the effect of the alteration of the rules upon the claims of a certain class of subscribers to the *Madras* Fund was very elaborately considered in the judgment delivered in the Privy Council by Lord Justice *Turner* in the case of the *East India Company* v. *Robertson* (1).

Upon the question whether, according to the original constitution of the *Madras Civil Service Fund* a subscriber was entitled to a refund of the excess of his subscriptions beyond one-half of the value of his annuity, the Judicial Committee came to the conclusion, though with doubt and hesitation, that the decision ought to be in favour of the *East India Company*. But it was unnecessary to pronounce any decision upon the point, as the members of the Judicial Committee were of opinion that the course of dealing and conduct of the Directors precluded them from disputing the right of that Respondent to a refund. I confess that, according to my view, the Committee might have determined that there was evidence sufficient to warrant the conclusion that the Company had originally sanctioned the rule in the shape in which it appears in the pamphlet of 1838. But as their view of this question did not affect the decision of the case it need not be farther considered.

(1) 12 Moo. P. C. 400.

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But the Judicial Committee expressly held, as to refund, that in the year 1853 the system of refunding was put an end to by the new rules proposed by the Directors and adopted by the votes of the subscribers. The very question which they had to decide was, whether the Respondent had been deprived of his right to a refund because the revised rules of 1853 did not contain the provision for refund which was contained in the rules of 1838—(they should have said, according to their view, "which the company was precluded from denying to have been in the rules of 1838.")—and they held that these revised rules could not operate retrospectively so as to destroy rights which had been acquired before they were established.

Now what were Mr. *Robertson's* rights before the system of refunding was put an end to by the new rules? Mr. *Robertson* having been informed that an annuity of £1000 was open for his acceptance, wrote to the secretary to the Civil Fund, and agreed to accept it, provided that on retirement the excess paid by him, with interest, beyond the half-value of an annuity of £1000, should be refunded to him.

In September, 1853, the annuity was again offered to him upon the footing of the revised rules, and was ultimately received by him under protest. The Judicial Committee affirmed a decree of the Supreme Court of Judicature of *Madras* in favour of Mr. *Robertson*, on the ground that, before the revised rules, he had acquired a complete title to the refund of the excess of his subscriptions, by accepting the annuity only on the condition that the excess of his payments should be refunded to him, which the trustees had no right to refuse. And they held that whatever Mr. *Robertson's* rights were when he accepted the annuity, they continued upon his acceptance, and could not be taken away by any subsequent regulation respecting rights of a similar character.

At the time of the introduction of the rules of the 17th of June, 1853, Mr. *Underwood* had been a member of the *Madras* Civil Service for twenty-five years, and had resided in *India* during the whole period. And at this time there was standing to his credit in the books of the fund an amount, which was in excess by 4144 rupees, 4 annas, 4 pies of the sum which he would have had to pay as the half-value of an annuity of £1000. From the 17th of

June, 1853, to the 1st of May, 1860, when he retired from the service, the deduction of 4 per cent. from his salary and emoluments was continued and credited to the fund. In October, 1859, Mr. *Underwood* tendered his resignation, and his acceptance of an annuity of £1000, but without prejudice to his right to a refund of the accumulated value of his subscriptions over the half-value of his annuity. The Secretary of State refused to allow the claim, but, without admitting any legal obligation, he repaid to Mr. *Underwood* the excess of the accumulated value of his subscriptions over the half-value of an annuity standing to his credit on the 17th of June, 1853, together with an interest at 5 per cent. from that date to the day of payment.

The only question, therefore, is as to Mr. *Underwood's* right to recover his payments in excess after the date of the revised rules of the 17th of June, 1853.

Of course, no consideration of the hardship of any particular case can be admitted, the only question properly open being, whether the rule of refund was abrogated by the revised rules, and if it was, what was the effect upon a subscriber to the fund in the position of Mr. *Underwood*, who was qualified to receive a pension at the time, but had not intimated his acceptance, nor had one tendered to him. As to the abrogation of the rule of refund by the revised rules, I have already intimated my opinion. It was clearly within the competency of three-fourths of the subscribers at the general meeting to put an end to the system of refunding; and the Judicial Committee held, that by the adoption of the revised rules they had done so. These rules must have come into operation at their date, and have applied to all future payments to the fund. If they did not thus operate immediately, it is difficult to see how they could have operated at all till the whole body of subscribers existing at the time had passed away. For they all had subscribed to the fund on the footing of receiving back the excess beyond the half-value of the annuities, and were all compelled to submit to the deduction of 4 per cent. from their salaries and emoluments during the time they continued in the service.

No line can be drawn anywhere between those who were in progress towards becoming entitled to a pension, except at the date of the 17th of June, 1853. It may be that those who at that time

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had paid more than the half-value of their annuity would be entitled to have that excess refunded—upon which I desire to express no opinion. But payments in excess made after the date of the revised rules are, in my opinion, no longer recoverable. This will not give the revised rules a retro-active operation, as they would have had in the case in the Privy Council if Mr. *Robertson* had been deprived of his payments in excess of the half-value of his annuity, for his title was held to be complete by his having absolutely accepted an annuity. But Mr. *Underwood* had, at the highest, only an inchoate title (if it can properly be called a title at all) to a pension, which it would be in his power at some future time to complete upon the offer of an annuity. It may be hard upon him that the revised rules should have intercepted his right to continue his payments (which were already in excess of the half-value of his annuity) on the footing of his recovering them back, yet I do not see how the resolution of the meeting of the 17th of June, ,1853, could have its full operation in any other manner.

I, therefore, have arrived at the conclusion, with some regret, and not with that confidence in my opinion which I should have felt if it had agreed with that of my noble and learned friend, that this appeal must be allowed, and the decree appealed from reversed.

LORD WESTBURY :—

My Lords, after the very full statement which has been made by my noble and learned friend who has just sat down, it would be an unpardonable thing if I were to read to you a written judgment which might be equally long. I concur entirely in all that my noble and learned friend who has last spoken has said, except in the expression ultimately of some diffidence in his conclusion, and also in his expression of regret at having arrived at that conclusion. In those feelings I cannot concur. I have no doubt of the accuracy of the conclusion at which he has arrived, and I should have felt great regret at the infinite confusion which would have been introduced into the administration of this fund, if the majority of your Lordships had arrived at any other conclusion.

My Lords, the decision of this case—after the decision of this House in the case of *Boldero* (1), and the decision of the Privy Council in the case of *Robertson* (2)—is exceedingly plain and obvious. Let a few propositions which are established be recollected. The rules of the Civil Service in *Bengal* were transferred to the Civil Service of *Madras*. The Privy Council in the case of *Robertson* had some little hesitation in arriving at the conclusion that the *Bengal Civil Service Fund* did not warrant the refund of the excess. This House felt no such difficulty, but decided positively, and, I think, truly, that the rules of the *Bengal* Service did not warrant any refund of excess. And this House decided another proposition, namely, that whilst a servant remained in the service he was bound to continue his subscription, although the subscriptions already contributed by him exceeded the amount ascribed by the rules as the value of his annuity.

The Lords of the Judicial Committee of the Privy Council decided, that although the *Madras* Rules, copied in 1824 from the *Bengal* Rules, did not warrant a refund, yet that the rules as published in 1838 did warrant a refund. They had some little hesitation in arriving at the conclusion how the rules of 1838 should bind the Company, and there is a little obscurity as to whether they held the Company bound upon the ground that they must be assumed to have duly assented to the alteration, or whether they held the Company bound upon the ground that they had permitted that alteration to be published and circulated as if it had been duly and regularly made; and that, therefore, they must be considered as personally estopped from denying that the addition was a legitimate portion of the rule.

But whether you ascribe their determination to one ground or the other it equally involves this, that the Privy Council decided that it was competent to the subscribers at *Madras* to make that addition to the rules. But if it was competent to them to make that addition, then, by the clear interpretation of the 30th rule, by which that authority was given, there was equally authority to take it away. And the question before us is reduced to the simple question of fact:—Did the subscribers at that meeting, which was convened and held in June, 1853, discuss, and determine after a

(1) 11 H. L. C. 405. (2) 12 Moo. P. C. 400.

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good deal of discussion, the rule of refund, and are they, or are they not, bound by the resolution to which they came?

My noble and learned friend upon the woolsack has come to their relief by holding that they did not discuss nor did they determine, but they submitted to the arbitrary command of the *East India Company*, and that the conclusion to which they came cannot, therefore, be regarded as the conclusion of a voluntary deliberative body, but as a conclusion to which they were compelled to submit. My Lords, I cannot derive any such conclusion from the facts. I see on many occasions a very sturdy spirit manifested by these subscribers towards the *East India Company*, and they have not been slow to invoke Courts of Justice to protect them and to determine their rights. The evidence given by the affidavit of Mr. *Underwood* of what passed at the meeting shews plainly that—notwithstanding their prior resolution to the contrary, which I think is of itself abundant evidence that there was no servile spirit in the body—it is clear that, on a deliberate view of the condition of the fund, they did arrive at the conclusion that the Directors were warranted in the demand that they made, and that this addition, which was contrary to the spirit of the original order, and contrary to the practice and rules in the other Presidency, should be extirpated from the existing rules, and should be rejected and repudiated by the Civil Service. They found themselves bound to accept that conclusion as the conclusion which was just and right, and they also felt themselves bound to consider that this conduct of theirs, in recurring to the original constitution of the Service Fund, would be most expedient for the subscribers in the end.

Now it only remains to add one word, in order to shew why the case of Mr. *Robertson* was accepted, and why the case of Mr. *Underwood*, as I think, ought to be rejected. The Privy Council determined, that whilst the original rules, with the addition of 1838, were in full force and rigour, and had not been abrogated or annulled, Mr. *Robertson* was perfectly right, when the annuity was tendered to him, in demanding, *plus* the annuity, the restoration of the excess of his contributions; and that the Directors and the trustees of the fund were wrong in refusing to grant him the annuity with that addition. Mr. *Robertson's* title was, at that time, perfect and complete, and was sought to be enforced before the addition of

1838 was obliterated from the rules. Mr. *Robertson,* therefore, was entitled to recover as a man whose demand had been unduly rejected, the demand being made at a time when the existing rules justified that demand. But Mr. *Underwood* is not in *pari passu ;* he had never made his claim and perfected his title, and, antecedently to the abrogation of the rule in June, 1853, he was simply in the condition of a servant in the Civil Service contributing his subscriptions to the fund, and, by the effect of the decree of this House, bound to continue those subscriptions whilst he remained in that capacity. He passed, therefore, from the state in which he then stood into the state of a continuing subscriber under the new rules of 1853. And under those rules, which then constituted his title, and formed the only foundation on which he could claim his annuity, he was no longer entitled to add to that claim a claim for the restoration of the excess.

My Lords, I think the members of the Civil Service have very little to complain of. They have been treated with great liberality by the Government. It was an extremely desirable thing that they should not be put in opposition to the Government, and the determinations of this House and of the Privy Council on the points I have enumerated, appear to me (that, however, is immaterial, because they stand by their own strength and vigour), after all the elaborate review which has been given to this matter in the recent argument, to rest upon the most solid principles. And from those decisions the determination of this case is a mere necessary consequence. I think, therefore, the decision of the Court below ought to be reversed.

LORD COLONSAY :—

My Lords, without going through in detail that which has already been so fully narrated of the history of the fund, and the steps which have been taken in regard to it, I shall merely mention the propositions I have had occasion to consider, and the conclusions at which I have arrived with regard to them in considering this case.

I think the book published and circulated by the trustees of the *Madras Civil Service Fund,* in 1838, must be taken to contain a correct representation of their understanding of the rule as to what is called refund. I think there is sufficient evidence of the recognition by the Directors of the *East India Company* of that

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rule as obligatory on them. The Directors were desirous to have the system of refund abolished, and pressed their views, but without success. In particular, in September, 1850, the members, by 66 to 8, decided against abrogating the practice of refund. The Directors became more peremptory, and indicated a disposition to concuss. The trustees remonstrated, the Directors persisted, and, in October, 1852, the Directors issued something like an order, and sent out a new set of rules to be submitted to the managers of the fund, omitting the rule as to refund. On the 17th of June, 1853, a meeting of the subscribers was held, and the new rules proposed by the Directors were passed by 108 to 2, being the constitutional majority for doing whatever such majority could do with the concurrence of the Directors, in regard to alteration of the rules.

But questions have been raised as to the import and the legal effect of that vote. First, was the matter of refund submitted to the consideration of the subscribers, and did they vote upon it at all? Secondly, if they did vote upon it, what legal effect can that vote have upon the matter of refund? Thirdly, assuming it to have some legal effect, to what extent, if any, did it affect a person in the position in which Mr. *Underwood* then stood?

The matter of refund was submitted to and considered by the members. In the first place it had been and was at the time a matter of contention between them and the Directors. Secondly, the dispatch which was sent out with the new rules did contain a positive statement upon this subject, and it was the main reason, or at least one of the main reasons, for submitting those rules to the consideration of the members. Then the rules were submitted to the members, and a special circular was sent which directed, or ought to have directed, the attention of all the members to this particular rule. Then, when the meeting took place, there was brought before it the letter by Mr. *Elliot*, which again called attention to the subject. And finally, there was no exception or reservation in these minutes or proceedings as to the matter of refund. I therefore cannot doubt that they must be held to have considered the matter of refund.

Then, farther, I think the subscribers, with the concurrence of the Directors, could alter the rules and practice of refund. It is scarcely contended that such vote could have no effect—the con-

tention is, that it could not affect members who had attained a certain position, or what was called a vested interest. Then what was the position of the Respondent? Had he the vested interest referred to? Certainly he was not in the same position as *Robertson*. But he was in this position, that he had already paid in excess, and had served his time. If the question had been whether what had already been paid in excess was to be held as forfeited by the resolution, I should have thought that resolution would have been of doubtful justice and of doubtful competency. It is not necessary at present to decide that question. If the members had approved in direct words of the abrogation of the practice of refunding, with the condition that excess already paid should be refunded, I should have had no doubt of the competency of that resolution. It would have placed the Respondent in the same position as all others will be when they have served their time and paid the half-value of the annuity. But Mr. *Underwood* had not attained the position which had been attained by Mr. *Robertson*, who had reached the pension, and whose title was complete. I therefore think the judgment now proposed by your Lordships to reverse that of the Court below is a right judgment.

There was a suggestion by Mr. *Anderson* that as the decision of the Court below was pronounced on a motion for a decree, the only order the House could make would be one declaring that the Court below ought to have refused the motion. It was contended, however, on the other side, that if a suit was brought to a hearing upon a motion for a decree, the order made was a decree in the suit, and, if adverse to the prayer of the bill, the suit failed.

The Lords adopted this view of the matter; and as to costs, it was subsequently arranged, with the approval of their Lordships, that the decree complained of should be reversed; and (the Secretary of State expressing his assent) that the money paid to Mr. *Underwood* under the decree should be refunded, after deducting his costs in the original suit and in this appeal.

Lords' Journals, 20th May, 1870.

Solicitors for the Appellant: *Lawford & Waterhouse.*
Solicitors for the Respondent: *Steele & Sons.*

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July 4, 5.

THE DIRECTORS, &c., OF THE LONDON AND SOUTH WESTERN RAILWAY COMPANY AND GEORGE CLEMENT . . } APPELLANTS;

AND

RICHARD DODDRIDGE BLACKMORE . . RESPONDENT.

7 H L 287.
12 L D 4
5 App Cas 7
14 L D. 892
834
20 L D 424
429, 436
— 567.

Town—Lands—Building Purposes—Adjoining Proprietor—Lands Clauses Act—Directors' Statement—Release—Costs.

Quære, Whether *Teddington*, in the county of *Middlesex*, is a "town" within the meaning of the *Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 18), s. 128? The lands near it, situated close to the railway station, and not continuously built upon, are not lands within a town, nor lands used for building purposes, within the meaning of that section.

Lands acquired by a railway company for the purposes of the railway, but not so employed, and merely capable of being afterwards used for building purposes, are not, on account of such capacity alone, to be treated as building land, or "lands used for building purposes," within the exception contained in that section.

Where a company having purchased land for the purposes of its railway, after using some of the land, sells the rest, calling it in the advertisement and particulars "surplus land;" this form of sale must be deemed a declaration that the land sold is "superfluous land" within the meaning of 8 & 9 Vict. c. 18, s. 127.

Though the directors of a railway company are not compelled to sell their superfluous land within ten years, yet if within that time they make the attempt to sell, the right of an adjoining owner to claim the benefit of pre-emption at once arises.

Such land must, under sect. 128 of the statute, be first offered to persons whose lands, or some of them, have been taken in virtue of the company's act, or who are "owners of the land adjoining."

Where, by agreement, a wall has been built on land dividing the property of an individual from that of the company, and the individual and the company are, by the same agreement, the joint owners of the land on which the wall is built, that circumstance does not affect the individual, so as to prevent him from being considered an "adjoining" owner.

Where an adjoining owner claimed from a railway company a right of pre-emption of certain lands which the company was about to sell, such lands never having been his, nor severed from any part of his estate, the House, while affirming his right to make this claim, directed an inquiry whether there was any other adjoining owner who was equally entitled with himself to make such claim (1).

(1) In this case there was a lady who was treated by all parties as "an adjoining proprietor," but she did not claim any right of pre-emption, and had transferred any right she might possess in that respect to the Respondent.

General words in a release are limited to those things which were specially in the contemplation of the parties when the release was executed.

Where a decree of the Court below, though generally affirmed, was in some particulars varied, no costs of the appeal were given.

THIS was an appeal against a decree of Vice-Chancellor *Stuart*, which had decided in substance that the Respondent was entitled to the right of pre-emption in two plots of land, hereinafter referred to as Nos. 9 and 10, situate at *Teddington*, in the county of *Middlesex*.

In 1852 certain lands in *Teddington* were put up for sale by Messrs. *Duppa & Co.*, the owners, who advertised them as "Building Land." Only a few portions were sold, but some were purchased by a building society, and several houses and shops were erected upon them. The others were again advertised as before, but not purchased.

By the South Western Railway Acts (1859 and 1860), with which the *Lands Clauses Consolidation Act*, 1845, was incorporated, the company was authorized to purchase these and other lands for railway purposes.

In 1861 the company purchased the whole of the *Duppa* estate then remaining unsold. At that time the lots were "nicked" or fenced off for building purposes.

The Respondent was at that time the owner of *Gower House* and a good deal of land about it. He received in 1861 from the Appellants a notice that they required to take part of his land for railway purposes, and they did take, under this notice, two strips of his land, the value of which (£1160) was settled on arbitration and paid, and, as the Appellants now contended, the value of these strips of land was much increased by the successful contention of the Respondent before the arbitrator that the land was building land. In 1862 the Appellants sold and conveyed to the Respondent two pieces of land adjoining their station, for which he paid in one instance at the rate of £400, and in the other of £500 per acre.

Differences arose between the Appellants and the Respondent, which were terminated by an agreement dated the 11th of August, 1864. Among its other provisoes was one to the effect that the Respondent (on certain conditions therein stated) should execute to the

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Appellants a release of all claims and demands therein mentioned, or for or on any other account or ground whatsoever. Another proviso was, that he should erect a wall between certain points therein described, for the purpose of dividing his property from that of the Appellants, and that such wall when erected should become the joint property of the Respondent and of the Appellants, and should be maintained and kept in repair at their joint expense.

The release was executed, and the wall was erected.

All the land which had been purchased by the Appellants for the purposes of the railway not having been required for use, Mr. *Fuller*, an estate agent, was, in 1866, authorized to sell it by auction. He announced that the sale would take place on the 23rd of May, 1866, and the lands were described in the particulars of sale as "surplus land at *Teddington*," &c., and as "building land." The land was also described as "well adapted for the erection of shops and villa residences." On the 19th of May the Respondent had an interview with the solicitor of the Appellants, and gave notice that he claimed, as to these surplus lands, a right of pre-emption as an adjoining owner. His claim was not admitted. He attended the sale and gave formal notice of his claim. The sale, however, proceeded, and Mr. *Clement* became the purchaser of two pieces of ground, which were now the especial subject of dispute.

Up to the time of the sale to the Respondent of the two pieces of land before-mentioned his land only touched that of the Appellants at one corner of a plot of land; after the sale his land lay for some short distance alongside that of the Appellants, but for the whole of this short distance was separated from it by the wall already mentioned. Under these circumstances the Appellants refused to recognise him as an "adjoining owner," or to acknowledge that he had as such any right of pre-emption.

On the 24th of July, 1866, he filed his bill against the directors, &c., of the *South Western Railway Company*, and also against Mr. *Clement*, the purchaser of the disputed pieces of land. The bill set out most of the facts already stated, and prayed that Mr. *Blackmore* might be decreed entitled to have the lands offered to him, pursuant to the provisions of the 128th section of the *Lands Clauses Consolidation Act*, 1845, before they were conveyed

to Mr. *Clement*, and that the conveyance to Mr. *Clement* might be set aside, and the lands conveyed to the Respondent.

The Appellants insisted that the lands in question were not within the enacting part of the 128th section, but were within the exception contained in that section, being building lands within a town (1).

Evidence was adduced by affidavit to shew that the lands were, and also to shew that they were not, of the kind described.

The cause was heard before Vice-Chancellor *Stuart* in July, 1868, and His Honour made a decree granting the prayer of the bill. This decree was enrolled, and the present appeal was then brought.

Sir *R. Palmer*, Q.C., and Mr. *T. W. Greene*, Q.C. (Mr. *Locock Webb* was with them), for the Appellants, contended that, within the meaning of the 128th section, *Teddington* was "a town," and that these lands were "lands built upon, or used for building purposes." They also insisted that the Respondent was not "an adjoining proprietor;" that the mere touching of his land at a corner of another piece of land did not make him so, and that the separation of his land from that of the Appellants by a wall, the ground under which was the property of both, prevented him from having that

(1) 8 & 9 Vict. c. 18, s. 127:—"Within the prescribed period, or, if no period be prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands, and apply the purchase-money arising from such sale to the purposes of the special Acts, and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same."

Sect. 128: "Before the promoters of the undertaking dispose of any such superfluous lands they shall, unless such lands be situate within a town, or be lands built upon or used for building purposes, first offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed; or if such person refuse to purchase the same, or cannot after diligent inquiry be found, then the like offer shall be made to the person or to the several persons whose lands immediately adjoin the lands so proposed to be sold, such persons being capable of entering into a contract for the purchase of such lands, and where more than one person shall be entitled to such right of pre-emption, such offer shall be made to such persons in succession, one after another, in such order as the promoters of the undertaking shall think fit."

Sect. 129 required that the claim of right of pre-emption should be made within six weeks.

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character. *Elliott* v. *The South Devon Railway Company* (1); *Reg.* v. *Cottle* (2); *Carington* v. *The Wycombe Railway Company* (3); *Coventry* v. *The London, Brighton, &c. Company* (4); *Moody* v. *Corbett* (5), were cited.

Mr. *Cecil Russell*, and Mr. *Andrew Anderson*, appeared for Mr. *Clement*, but did not address the House.

Mr. *Mellish*, Q.C., and Mr. *Martineau*, for the Respondent, commented on these cases, and cited in addition *Lord Beauchamp* v. *The Great Western Railway Company* (6), which established that where the directors had by their own act shewn certain land to be "superfluous land," the right of an adjoining owner to the benefit of pre-emption at once arose.

Sir *R. Palmer*, in reply.

THE LORD CHANCELLOR (Lord *Hatherley*), having stated the nature of the case, said:—

The points which have been argued before us with regard to the land in question have been these:—The railway directors say, First, we are not compellable to offer this land to anybody before selling it, as we have sold it, or attempted to sell it, by auction, because it is "situate within a town," and is therefore within the exception. Secondly, if it is not considered to be situate within a town, it is land which, within the meaning of the Act, is "used for building purposes." It is not pretended that the land was "built upon," but it is said that it was within the exception of "land used for building purposes." Thirdly, it is said, with reference to the Plaintiff's position, that the Plaintiff has no *locus standi* here at all in any view of the case, because his land is not "adjoining."

Those are the first three points which we had to consider, and upon those three points we have had time to deliberate since hearing the case yesterday. First, with reference to the land being situate in a town. This part of *Teddington* may possibly (it is not necessary for me to say more), if at some future time a

(1) 2 Ex. 725.
(2) 16 Q. B. 412.
(3) Law Rep. 3 Ch. App. 377.
(4) Law Rep. 5 Eq. 104.
(5) Ibid. 1 Q. B. 510.
(6) Ibid. 3 Ch. App. 745.

railway should pass down the *High Street* of *Teddington*, be considered as within the definition of Lord *Wensleydale* in the cases that have been referred to, a definition adopted, and somewhat more neatly expressed (if I may be allowed to say so) by Mr. *Russell Gurney*, when sitting as a Judge at the assizes, and his interpretation has received the approbation also of Lord *Campbell* (1). That definition amounts to this: that where there is such an amount of continuous occupancy of the ground by houses that persons may be said to be living as it were in the same town or place continuously, there—for the purposes of the Railway Acts, and according to the popular sense of the word, and not the legal sense of the word, which would not give at all a sensible definition—the place may be said to be a town. And it is possible that the *High Street* of *Teddington* might come within that description of a town which has been given in the cases I have referred to. But with regard to this particular place where the land is situate which has been offered for sale by auction, it appears to me, I confess, that there is no pretence for saying that that particular land is situate in a town. If *Teddington* be a town, this is not a part of the town of *Teddington* in the sense in which the word has been interpreted by the authorities that have been referred to, because, in truth, this piece of land, which was lotted out by the railway directors to the Appellant in ten lots, lotted out by them undoubtedly for the purpose of being sold in what are called building lots, or as building land—has nothing near to it in the shape of continuous residence by persons occupying houses. There is on the one side of it a small row of houses built by some building society, or freehold land society, which purchased the land of *Duppa's* trustees, as the company bought this land of *Duppa's* trustees, but which is not in immediate contiguity to the land in question. But with that exception, and the exception of the house of the Plaintiff in this suit, who has built a house on the property which adjoins the railway property, there is really nothing which can be said to be occupied by persons in such a manner as to constitute continuous residences, or anything like it in any reasonable sense that could induce your Lordships to say that the land is "situate within a town."

(1) *Reg.* v. *Cottle*, 16 Q. B. 412, 420, 421.

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But the other point, which seemed to me to be much more open to argument at first, was the question whether or not this land was land "used for building purposes." And here we have not been assisted so much, as on the other point of what constitutes a town or not within the meaning of the Acts, by previous authorities. I apprehend, my Lords, that when we read the two phrases together, "land built on," "or used for building purposes," it must be clear that the words "used for building purposes" do not mean what is ordinarily called "building land." Building land is a term frequently used for land capable of being built on, land suitable for being built on in the judgment of those who come to that conclusion. Anyone who has lived many years in the neighbourhood of *London* may have seen for ten years or more together a board put up saying, "This valuable land to let for building," without any building following thereupon. It is not, therefore, because a proprietor thinks it suitable for building purposes, or that it would be reasonable that the land should be built on, or that it would be valuable to a person who took it for that purpose, that the land can be considered to be land "used for building purposes." Neither I apprehend does it avail to say, that the immediate predecessor in title of the railway company used that expression, and offered the land for sale for building purposes, and, as it has been here termed, "nicked it out," or marked it out, as land capable and suitable for being built on, unless some step had been taken which shewed that the land was not to be dealt with under the 128th section because it had been used for the purpose of building. I think when you take the words "built upon," you have a clue at once to what is meant by the other words, which follow "or used for building purposes." It means simply this, it seems to me, that if the land is actually built on, that is not a case in which the Legislature conceived that the adjoining owner should have this special right conferred upon him; but after considering the case of land being "built upon" it was thought that there might be land not actually built on, which still, nevertheless, would stand exactly in the same position with reference to the propriety of conferring upon the adjoining owner the right of purchasing the property, and therefore disturbing that which was done in the course of the user of the land for building purposes. For instance, it

would occur to all men, naturally, that there might be an intention to erect a square, such as *Grosvenor Square*, or any other square, and there might be two sides of that square finished, or three sides of the square, and the third or fourth side might not be finished, or even all the four might be finished, and yet there might be a central portion of land to which there would be access by the streets that exist at the corners of most squares. And the land, if the Legislature had used the words "built upon" alone, would not have been within the expressions contained in the Act, and might have been therefore claimed by the adjoining landowner to the great detriment of the buildings which existed all round it, and for the use and recreation of the inhabitants of which this central space or square had been appropriated. So, again, there might be a space "used for building purposes" in the shape of gardens of reasonable size, or in the shape of a reasonable amount of curtilage for houses about to be erected. That might be land which the Legislature might well conceive was land "used for building purposes," that is to say, connected with the purposes of the erection of the buildings, and therefore to be protected in the same manner as land actually to be built upon. Farther than that, in any large building speculation there might be cases in which a large quantity of materials would have to be brought and accumulated, for instance, the stacking of bricks, and a variety of purposes of that kind, for which it would be absolutely necessary for the builders to avail themselves of land for the purpose of carrying on the buildings. I apprehend that that, in the most strict use of the expression, would be "land used for building purposes." But, as I apprehend, it is not because you think that certain land might be applicable for building purposes, and may be very suitable for those purposes, and may be sold for those purposes, that it comes within either the meaning or the spirit of the words "land used for building purposes," by which, I apprehend, is meant land actually used for building purposes; not land contemplated to be used for building purposes, or intended to be used for building purposes, or thoroughly suitable for building purposes.

I asked a question during the argument as to another case which might possibly come (it is not necessary to say more than that it might possibly come) within the meaning of the words "used for

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building purposes," whether the directors there had been under any contract with anyone to use the rest of this land for building. It might have been that they had contracted, with those persons to whom they had sold land, that they would erect a square or a line of houses; and it might be a reasonable construction of the words, "used for building purposes," to apply them to a case where the directors had made use of this engagement or contract on their part in order to dispose of other land which they had sold, and which was built upon. I apprehend, my Lords, that there being no evidence whatever of any portion of this land here in question having been actually really used for building purposes; on the contrary, it being in evidence, as far as regards the present pieces 9 and 10 which are in controversy, that it is meadow land, and used for meadow land at the present time, and not let and used for any building purposes at all, though intended to be sold by auction as land which might be capable of being so applied —there is no ground to say that the land is "land used for building purposes."

Then the next point that comes before us is this: Is or is not the Plaintiff an adjoining owner? Now, I confess, if the junction of his property consisted in that mere corner which joins on to the other corner—and which is not a mere mathematical point, which it would be difficult to predicate of any spot on the surface of the earth—marked out by hedges, where a circle of a few feet in diameter would encompass the point of junction, I should not have been disposed to hold that he was, within the intent and meaning of the Act, an adjoining owner. But there is a much more important junction here, namely, that portion of land purchased from the company in 1864, and conveyed by the directors to the Respondent by the deed of the 12th of August, and which land seems to me to have been wholly conveyed to him up to and including the very borders along the line of C. E. marked upon the plan. It is quite true that it was agreed afterwards that the directors were to join in the expense of the wall or fence; and it is said that this wall or fence shall be the joint property of the company and the Respondent. But nothing is said about the site or foundation of that wall or fence; and what seems to have been intended was, that for ever thereafter the company and the purchaser, or those who repre-

sented him, should always be at the joint expense of maintaining the wall. But as regarded the *solum*, or the place upon which the wall rested, I am inclined to think that the construction of this instrument would be that that *solum* was conveyed away, the directors reserving to themselves a joint interest in the actual wall, and imposing upon the purchaser a joint liability in respect of it. Even if that were not so, I should be strongly inclined to hold the opinion that this species of joint ownership thus being brought up to the very site of the property in question—really, not only in spirit and substance, but in the very words—would be sufficient to constitute him an adjoining owner, having this right of purchase as against the company. The directors themselves could not claim to exercise that right as joint owners. For they have parted with their land, and have vested their right and interest in the present Plaintiff, subject only to this joint expense to which the two parties were to be subject with reference to the wall itself.

That being so, there then arose the other question upon which we have heard the Respondents, namely, what was to be done with reference to the present position of things. This gentleman, the present Plaintiff, is not the owner of land from which the property was severed that is now in question, namely, Lots 9 and 10; he has subsequently become the owner of property which adjoins it, and he finds himself in that position at the time of the sale. But his rights are very different in respect to that property from what they would be with respect to land which had been actually taken from him. With regard to land actually taken from an owner, the Legislature appears to have been desirous that no person should be called upon to sell more than was really wanted for the purposes of the railway; and, therefore, it has been provided that as soon as it should be ascertained that the lands are not wanted for the purposes for which the Legislature intended that they should be taken from the landowner, and that they are superfluous, he should have the opportunity of re-acquiring the land of which he had been so deprived by the operation of the Act. Therefore the case of such a landowner is no doubt a much stronger case than that of persons who happen to be owners at the time when the intended sale takes place, but who have no such right as I have described. Accordingly, in the case of those others, each of them can only claim a

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right to say: "You, the company, shall not sell the land to anyone without offering to some or one of us." No one person who happens to be an adjoining owner can say: "You must make the offer to me;" but he can say this: "You shall not offer the land to a stranger without at least offering it to me in my turn." I do not know when my turn may come if there be other owners, you have a right to take us all in turn, and as you please, but you must take us in turn before you part with the land to a stranger. Having, however, that right, it is contended that he must wait for ten years from the time of the works being completed; during which period it is said the company has the option of saying whether it will sell or not.

Now, in the case referred to of *Lord Carington* v. *The Wycombe Railway Company* (1), it was decided, and I think very justly decided, that when directors, upon the best consideration they could give to the case, have not only said: "This land is superfluous," but have put the land, as such, up for sale and sold it, the Court will say to them: "The time has arrived at which you are to make the offer to the adjoining owners." Because, how absurd it would be to say that the land shall not be sold to anyone else without a previous offer being made, and yet, when the land is actually sold and conveyed to some one else, then the persons who ought first to have had the offer are not to be entitled to come to the Court; that after your right has been attempted to be pretermitted by this actual conveyance and sale, your only right is to come and interpose between the actual conveyance and sale if you have time so to do, or to have the conveyance set aside; but that you are not entitled to say that your right of pre-emption has arisen, that you must wait for that some time longer, because the company having attempted to deprive you of your right, and having been foiled in that attempt, have now the opportunity of holding back and saying: "If we are not allowed to deprive you of this right we shall not offer the land for sale at all till the end of the ten years." I apprehend that the Legislature meant that right of pre-emption to arise at the very moment when the company chose to sell. The directors may sell at any time they choose within the ten years; they may exercise their choice within that time, but when they do exercise their

(1) Law Rep. 3 Ch. App. 377.

choice, when they have sold, and when they are about to convey the property to the person to whom they have sold, I apprehend the time has arisen for a person entitled to the pre-emption to come and say: "You, the directors, plainly and manifestly have thus, by this act of yours, decided and declared that the land is superfluous—because, unless it is superfluous, you are not entitled to part with it. You have attempted to part with it. You have conveyed it, or attempted so to do, and now that that attempt has been frustrated my right of pre-emption intervenes, and I want now to assert my right of pre-emption." I apprehend that the Plaintiff is right in filing his bill at that time, and that the directors are not entitled to say: "The land shall come back to us," but that they are bound to offer to the adjoining owner that pre-emption which the statute says they shall offer.

Then, my Lords, we come to the last point, upon which your Lordships felt some difficulty, as to what should be done with reference to the peculiar position of the Plaintiff, who is only one of many having this right of pre-emption, and who cannot say, "I have the first right." All must have an equal opportunity of asserting their rights. Whether or not he ought to bring his right in the first instance before the Court, in order that the company might exercise its choice, if it thought fit, I need not say. I do not think that he is bound so to do if the matter can be adjusted, as it appears to me it can be adjusted, by means of an inquiry. In this particular case there is clearly one person, at all events (it is not necessary to say more now), Mrs. *Holberton*, who has quite an equal right with the Plaintiff to have the offer made to her. It is true she has written a letter, saying that she waives this right which has been offered to her, but I believe it appears to your Lordships, as I confess it does to me, that that letter is not a communication which would alone, standing by itself, bind her, or prevent her hereafter filing a bill of the same character as that which has been filed by the present Respondent. Something was said about her having waived her right by allowing the sale to take place. We have no evidence before us as to what she might or might not have done, or as to what amount of laches may or may not affect her with reference to this question. And it appears to me that we can both effectually do justice to the Plaintiff on

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the one hand, and secure Mrs. *Holberton* against injustice on the other hand, by directing the inquiry which was suggested in the course of the argument—as to whether or not any other person entitled to the same right as the Plaintiff is desirous of purchasing. With reference to this point, however, as to who the persons are with reference to whom this inquiry should be made, I think it would be right, possibly, in decreeing the inquiry to confine it to the persons whose land adjoins these Lots Nos. 9 and 10.

It was said that the present Respondent could not claim the Lots 9 and 10 without being at the same time willing to make an offer for all the lots from 1 to 8, which were included in the block offered for sale. But it appears to me that whatever difficulty may hereafter occur, and one cannot help foreseeing that there may be a difficulty upon the subject with regard to those who are not adjoining owners, I think we are remarkably free in this case from any difficulty of that description. Lots 9 and 10 constitute a very definite property. Lots 9 and 10 being one field, separated by a private road from the rest of the lots offered for sale. But the case does not rest there. We have it in evidence that the other lots from 1 to 8 were put up to auction, and those lots, which all come up to the private road, have undoubtedly been sold by auction, as is proved by the evidence in this cause. It was suggested in argument that the propriety of the sale of those lots may be a question hereafter, and upon the same grounds as those upon which the present Plaintiff questions the propriety of the sale of Lots 9 and 10. But, at all events, there is no evidence that should induce us to come to that conclusion. We find that this gentleman occupies the land on one side of this separated field, which was divided into two lots for the purposes of sale, and we are told that Mrs. *Holberton* occupies the land on the other side. I think, therefore, that, with your Lordships' concurrence, our proper course will be to vary the decree of the Vice-Chancellor, following that decree in so far as it declares that the Respondent—and I should propose to add these words after the word "Respondent"—"And the other owners of the land adjoining Lots 9 and 10 were entitled to have these lands offered to 'them' (instead of 'him') by the Appellants pursuant to the provisions of the 128th section of the *Lands Clauses Consolidation Act*, 1845, before

the same were sold or conveyed to the Appellant *George Clement*, and that the deed of conveyance to *Clement* ought to be set aside, and it is ordered and decreed accordingly." Then an injunction to restrain the company from selling the lots until they shall have offered the same to the Respondent, or the other owners, pursuant to the 128th section of the *Lands Clauses Consolidation Act;* and inquire whether any of the other adjoining owners besides the Respondent are willing to purchase, and if it should be found that there is no other adjoining owner willing to purchase, then, to pursue the decree of the Vice-Chancellor, "that on payment by the Respondent of the purchase-money to be agreed upon (or, if not agreed upon, to be ascertained according to the 130th section of the *Lands Clauses Act*), conveyance should be made." We should then leave the order below standing with regard to costs; but inasmuch as we have varied, to some extent, the decree there should be no costs of the appeal.

LORD WESTBURY:—

My Lords, to the observations that have been made by my noble and learned friend touching the true meaning of the word "town" in the sections of the Act of Parliament, and touching also the true construction and extent of the words "used for building purposes," I have nothing whatever to add. I think the interpretation which he has given to those words is the true interpretation according to the intent and meaning of the Act.

My Lords, there was a very small point to which my noble and learned friend has not adverted, raised in the argument of the learned counsel—I think in that of Mr. *Greene* particularly—that the present Plaintiff has lost his right by the operation of a general release which he gave to the company on the occasion of some dispute between himself and the company, which terminated in an agreement with respect to the wall and the maintenance thereof. Now, it is impossible to accede to that argument. The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given. But a dispute that had not emerged, or a question which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a

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general release. There is no difficulty, therefore, in holding that the present contention on the part of this Plaintiff, Mr. *Blackmore*, in respect of matters that subsequently arose, cannot be at all affected by words in a release given anterior to the arising of the subject of the present dispute.

Then, my Lords, there was another point in which, for the moment, I entertained some difficulty, but which, in truth, is much too narrow and trifling to be made the foundation of any decree by your Lordships, which was this: It was contended that the site of the wall, the *solum* on which the wall was founded, did by force of the agreement become the joint property of the company and the Plaintiff, and that, consequently, as to that small strip of land, the Plaintiff was not an adjoining proprietor of land within the meaning of the Act of Parliament. Now, upon looking at the agreement, I am by no means of opinion that it extends to alter the property in the site of the wall. But even if it did, I should by no means concur in the argument that the joint ownership of that little strip of land in the company and the Plaintiff would debar the Plaintiff from his right to be treated as an adjoining proprietor.

The real difficulty that arose in the matter was this: What was to be done after we had arrived at the conclusion that the sale was a mistake on the part of the company, and was not warranted by the power of the company. It followed, as a matter of course, that the sale not being within the power of the company, and the purchaser being perfectly aware of that fact at the time when he took his conveyance, the conveyance and the contract must alike be set aside as not being warranted by the Act of Parliament. But then the question arose: Were the directors to be remitted to their former position, and placed in a capacity to determine what to do with these lands as if they had never proceeded to deal with them as superfluous lands? That is a question which, at first sight, appeared to me to deserve much consideration; but, undoubtedly, in the cases referred to, it has been held, and I am by no means inclined to disagree with the decision, that the act of the directors in putting up the lands for sale, stamps the land absolutely with the character of superfluous land, and that the directors are estopped from denying that they have that character under the Act of Parliament. If that be so, the obligation of the

directors was clear. That obligation was to offer these lands first to the individual from whose lands they were originally severed. It appears, however, that there is here no such person, or no such person competent to buy. Then the obligation created by the Act of Parliament was equally clear; that the directors were bound to offer the lands to the adjoining proprietors, or to such one of them as they might prefer; but if there was no ground for preference, they must offer the lands to the adjoining proprietors, exhausting them all before proceeding to sell the lands to the general public. That being so, the Respondent comes within the category of persons to whom the directors were bound under the Act of Parliament to offer the lands. And I think, therefore, that the Respondent has a right to say: "What you have done has been a mistake and an error that must be set aside; but you must be treated as having done, or as doing now, that which you ought originally to have done, namely, offered the lands to me as one of the adjoining proprietors."

Some difficulty arose—and it was a serious difficulty at first—by reason of the fact that all the adjoining proprietors, when the company has made no choice among them, stand *in pari ratione;* and therefore we could hardly recognise the exclusive right of the Respondent until we had got rid of the co-equal rights of other adjoining proprietors. My noble and learned friend on the woolsack came to the relief of that difficulty by suggesting an inquiry whether there was an adjoining proprietor willing to purchase. And we have abundant materials for making that inquiry from what has been given in evidence touching the alleged renunciation of her right of pre-emption by the other adjoining proprietor, Mrs. *Holberton.* Therefore I entirely concur in the decree that has been proposed by my noble and learned friend.

There is only one other thing to refer to. It was urged by Sir *Roundell Palmer,* apparently with great reason, that there was another ground on which we ought to remit the matter to the railway directors, viz., that these particular lands which the Respondent claims the right to purchase were a part only of a larger quantity of lands treated by the railway company as superfluous lands, and that the railway company shall now have an opportunity of dealing with the entirety of the land. But what the railway

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directors have actually done is an abundant answer to that contention. They have, in fact, disposed of the remaining superfluous lands, and it is therefore impossible for them, in that state of circumstances, to contend that the Lots 9 and 10 should be given up to them in order that they may hereafter determine on the disposition of these two pieces of land jointly with the rest, seeing that they have disposed of the rest, and have therefore put it out of their power to deal with the whole.

It is unfortunate that this state of things has arisen; and I cannot help feeling very much for the situation of Mr. *Clement*, who proceeded, no doubt *bonâ fide*, upon the hypothesis that the company had a right to sell. But in my judgment the company had not the right to sell without first offering the land to the Plaintiff and to the other adjoining proprietors. That offer the Plaintiff has now a right to claim the benefit of; and if there be no competition with him, the directors must complete that contract which would have been the result of the offer if they had made it, as by the Act of Parliament they were bound to do.

I think the decree proposed by my noble and learned friend is correct in form, and that it will meet all the points of the case. But it must be particularly observed, that although we can, in this case, get rid of the difficulty as regards adjoining proprietors, seeing that there is only one other adjoining proprietor, so far as we have the facts before us, yet great difficulty might have arisen if there had been several adjoining proprietors. In the present case there is one other adjoining proprietor only; and I think her rights will be abundantly protected by the inquiry to be directed.

LORD COLONSAY:—

My Lords, I concur in the judgment proposed to be pronounced. I think these lands must in the circumstances of this case, looking to the course which the directors have taken, be regarded as superfluous lands in the sense of the Act. And I think that these parcels, Nos. 9 and 10, must in this case be regarded separately from those eight plots on the other side of the private road.

Then I think that these lands are not, in respect of their position or their condition, or the use that is being made of them, within the exceptions of the statute.

I think that the Respondent in this case is to be regarded as an adjoining proprietor, and that he has rights under the statutes which have been disregarded by the directors, and, therefore, it seems to me clear that the sale which has been made of these Lots 9 and 10 must be set aside.

Then, as to what is to be the result of that, I think that the course which has been suggested by my noble and learned friend on the woolsack does get rid of what appeared to me to be a very great difficulty when I was considering the case before that suggestion was made. I concur in the judgment proposed by my noble and learned friend.

Ordered, that the decree be varied, and that when varied it be as follows: Declare that the Respondent and the other owners of lands adjoining Lots 9 and 10 were entitled to have the lands forming Lots 9 and 10 in the particulars and conditions of sale and plan in the bill mentioned, and comprised in the deed of conveyance of the 12th of July, 1866, in the said bill mentioned, offered to them by the Appellants, the *London and South Western Railway Company*, pursuant to the provisions of the 128th section of the *Lands Clauses Consolidation Act*, 1845, before the same were sold or conveyed to the Appellant *George Clement*, and that the said deed of conveyance of the 12th of July, 1866, ought to be set aside. And it is ordered and decreed accordingly. Restrain the company from selling the said lots until they shall have offered them to the Plaintiff or the other owners, pursuant to the 128th section of the *Lands Clauses Consolidation Act*. Inquire whether any adjoining owner other than the Plaintiff is willing to purchase the said lots. And if it shall appear that no such person is willing other than the Plaintiff, then follow the Vice-Chancellor's decree just as it stood to the end, but if it should appear that any adjoining owner other than the Plaintiff is willing so to purchase, then reserve liberty to any of the parties to apply.

Lords' Journals, 5th July, 1870.

Solicitor for the Appellants, the Directors of the *South Western Company: Crombie.*

Solicitors for the Respondent: *Walker & Martineau.*

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July 1.

SIR CHARLES TAYLOR, BART. . . . . } PLAINTIFF IN ERROR;

AND

THE DIRECTORS, &c., OF THE CHICHESTER AND MIDHURST RAILWAY COMPANY . . . . . } DEFENDANTS IN ERROR.

Railway Company—Agreement before passing of the Act—Ultrà Vires.

7 H.L. 659. 661. 11 C.L.P. 487 8 Jur. (N.S.) 630

An agreement to arise and take effect on the passing of a bill then pending in Parliament is to be regarded, by virtue of that stipulation, as if it had been *de facto* made after the passing of the bill.

If an agreement to take and pay for land, made by the directors of a railway company, before the passing of an Act to authorize a work which is the subject of that agreement, is valid, its validity will not be affected by the fact that a part of such agreement relates to compensation for annoyance which cannot happen if the land itself is not required to be taken.

An agreement by which directors of a railway company bind themselves, in the event of their bill passing, to take land for the purpose of making the railway, and to pay for it within three months after the passing of the bill, is valid, and its stipulations become enforceable after the passing of the bill.

An existing railway company authorized by Act of Parliament to enter on a new undertaking and to add the new undertaking to the old, and to treat the capital intended to be raised for the new undertaking as capital added to the old, is thereby authorized (should it be unable successfully to raise the new capital, which is a matter not to be assumed) to apply to the new undertaking the funds previously applicable to the old.

The 73rd section of the 8 & 9 Vict. c. 18, does not affect the validity of a contract made between railway directors and a person who has not an absolute estate in the lands which are the subject of the contract. He is perfectly competent to contract, whatever may be the grounds of his demands. The section applies as between him and the reversioner or remainderman. The money when paid to him becomes affected by a trust, he being the trustee, and the other persons being his *cestuis que trust*. The directors may pay the money into the Court of Chancery, and such payment will, under the Act, be a fulfilment of the contract to pay it to the tenant for life, and the Court of Chancery has full power to allot to the tenant for life, or other person having only a partial or qualified estate, a portion of the sum, so paid into the bank, as compensation for any injury or annoyance he may sustain.

THIS was a proceeding in Error. A judgment of the Court of Exchequer had been given for the Plaintiff (1), which was reversed in the Court of Exchequer Chamber (2).

(1) 4 H & C. 409. (2) Law Rep. 2 Ex. 356.

The Plaintiff was the owner of land in *Sussex;* the Defendants were the directors, &c., of a railway company incorporated by Act of Parliament in the year 1864 for the purpose of making the *Chichester and Midhurst Railway.* In 1865 they proposed to make a branch railway, and were about to apply to Parliament for an Act for that purpose. This branch railway was intended to pass through the property of the Plaintiff. On the 17th of February, 1865, articles of agreement were drawn up between the parties which recited the above facts, and that "the line of the proposed railway will pass through the property of the said Sir *Charles Taylor* in such a manner as to intersect and seriously damage the same; he has accordingly intimated to the company his intention to oppose the said bill." In order to induce him to withdraw his opposition the company agreed to enter into the agreement and stipulations thereinafter contained, and in consideration thereof he agreed not to oppose the bill. There were then several heads of stipulations; the first began thus, "In the event of the said bill in its present, or any amended, modified, or altered form, with the like object, being passed into an Act during the present Session of Parliament the company will make and construct the proposed railway" according to a plan annexed to the agreement. The second was, that "In the like event the company will purchase from Sir *C. Taylor*, his heirs and assigns, and Sir *C. Taylor* will sell to the company, at the price of £2000, the several pieces or parcels of land being portions of the said estate which will be required for the construction of the railway and station, containing in the whole twenty acres or thereabouts." The third was, that "In the like event the company will, in addition to the said sum of £2000, and within the space of three calendar months next after the passing of the said bill, pay to Sir *C. Taylor* the farther sum of £2000, as and for a personal compensation to him for the annoyance, inconvenience, and disturbance, damage, loss, and injury which he has sustained, and may or will sustain, in respect of the sporting and preservation of game upon his said estate, by or in consequence of the construction of the said intended railway, and of the Parliamentary and other surveys, and other works connected therewith and incidental thereto." The other stipulations were of a similar character, each one beginning with the words, "In the like event,"

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or, "If the said bill should pass." The 14th article was a stipulation by Sir *C. Taylor* that "he will not farther oppose the passing of the said bill during the present Session of Parliament," and the 17th article said, "This agreement shall be void if the company fails to obtain an Act in the present Session of Parliament authorizing the construction of the said intended railway, or any railway, through any part of the estate of the said Sir *Charles Taylor*."

The bill passed, the money was not paid, and Sir *C. Taylor* brought his action to recover the sum to which he was entitled under the agreement.

The Defendants, in their first plea, set out the articles of agreement at full length, and then alleged that the railway in the agreement mentioned had not, nor had any part thereof, nor had any of the works, been made or constructed, and that the Defendants had not required or taken, for the purposes of the railway, any part of the Plaintiff's land, nor given any notice, &c., nor had they agreed with the Plaintiff or any other person for the taking of any such lands, otherwise than by the said articles of agreement. For a second plea they alleged that the Plaintiff had not sustained any annoyance, &c., in respect of the sporting, &c., in consequence of the construction of the railway, or surveys, or works connected therewith, and that the Plaintiff's land or his interest therein never was affected by any works, &c. There were two other pleas of a merely formal nature.

The Plaintiff, by his replication, took issue on the denial that he had suffered annoyance, and demurred.

The Defendants joined in demurrer.

The Court of Exchequer gave judgment on the demurrer in favour of the Plaintiff. In the Court of Exchequer Chamber this judgment was reversed by Justices *Keating*, *Mellor*, *Montague Smith*, and *Lush*, against Justices *Willes* and *Blackburn*. This proceeding in Error was then brought.

Sir *R. Palmer*, Q.C., and Mr. *Manisty*, Q.C. (Mr. *Horatio Lloyd*, Q.C., was with them), for the Plaintiff in Error:—

The contract here was valid. It was not made by mere projectors, but by the directors of a company actually in existence

under the authority of an Act of Parliament, a company which was merely going to Parliament to ask for new powers to create a branch line. That fact brings it within the principle laid down in *The Eastern Counties Railway Company* v. *Hawkes* (1). Even had it been otherwise, this was a contract which might have been made before the Act was passed, and could not, therefore, be afterwards impeached. It was a contract to take the land if the Act should pass. That alone, making the contract depend on the sanction of Parliament, made it valid: *Maunsell* v. *The Midland Great Western (Ireland) Railway Company* (2). Being also a contract by an existing company simply to make a branch railway to one already authorized and already made, it was a valid contract, and within the powers of the company: *Scottish North Eastern Railway Company* v. *Stewart* (3). But the Court of Exchequer Chamber thought that this contract was *ultrà vires*, and rested its judgment on three cases. Those cases do not warrant the conclusion at which that Court arrived. The first of these is *The East Anglian* v. *The Eastern Counties Railway Company* (4); the next is *Gage* v. *The Newmarket Railway Company* (5); and the last is *Macgregor* v. *The Dover and Deal Railway Company* (6). *Preston* v. *The Liverpool Railway Company* (7), and *The Earl of Shrewsbury* v. *The North Staffordshire Railway Company* (8), were also supposed to favour this view of the matter. That was a mistake. The first of these cases was one in which one company entered into a covenant to pay the costs which another company might incur in soliciting bills in Parliament; and it was with reference to that particular matter that Lord Chief Justice *Jervis* expressed the opinion here relied on when this case was in the Exchequer Chamber. In *Gage* v. *The Newmarket Railway Company* (5) the deed was in the form of a covenant to pay the Plaintiff two sums of money before entering upon his lands, and the Court thought that that covenant must be treated as *ultrà vires*, being, in fact, a covenant to pay large sums of money without any consideration at all. In *Macgregor* v. *The Dover and Deal Railway Company* (6) the covenant

(1) 5 H. L. C. 331.
(2) 1 H. & M. 130.
(3) 3 Mac. Sc. Ap. 382.
(4) 11 C. B. 775.
(5) 18 Q. B. 457.
(6) Ibid. 618.
(7) 5 H. L. C. 605.
(8) Law Rep. 1 Eq. 593.

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was by one company to pay another company the costs which the latter might incur by proceeding with a bill in Parliament, the first company agreeing, should the bill be passed, to take over the whole concern. Such an agreement was plainly unwarranted by the powers of the directors who made it. So, in *Preston* v. *The Liverpool, &c., Railway Company* (1), the agreement was to do something which was not legal in itself, and which the mere passing of the bill would not make legal. And the case of *The Earl of Shrewsbury* v. *The North Staffordshire Railway Company* (2) was one where the payment was considered to be nothing but a payment to buy off an opposition. These cases do not affect the present. Here is an agreement to take the land at a settled price, and the sanction of the Legislature, if withheld, puts an end to the agreement; if given, the agreement is in full force. On the other hand, there were the cases of the *South Yorkshire* v. *The Great Northern Railway Company* (3), where the proper rule was laid down in the clearest and most positive terms by Mr. Baron *Parke* (4), and again by Mr. Justice *Erle* in *The Mayor of Norwich* v. *The Norfolk Railway Company* (5); and the doctrines there stated were authoritatively repeated by Lord *Cranworth*, in *The Shrewsbury Railway Company* v. *The North Western Railway Company* (6); and by Lord *Wensleydale*, in *The Scottish North Eastern Railway Company* v. *Stewart* (7). In that case His Lordship said (8): "No objection can, I think, be made on the *ultrà vires* doctrine to a company wishing to alter one of the branches of its railroads, and about to apply to Parliament for authority to do so, engaging to purchase land from a neighbouring proprietor if the Act should be obtained." Similar opinions were expressed in *Bostock* v. *The North Staffordshire Railway Company* (9), and, again, in an elaborate judgment in *Maunsell* v. *The Midland Great Western (Ireland) Railway Company* (10). In the first of these cases, that of *The South Yorkshire and the Great Northern Railway Company*, Mr. Baron *Parke* said (11): "Gene-

(1) 5 H. L. C. 605.
(2) Law Rep. 1 Eq. 593.
(3) 9 Ex. 55.
(4) Ibid. 84.
(5) 4 El. & Bl. 397.
(6) 6 H. L. C. 113–135.
(7) 3 Macq. Sc. Ap. 382.
(8) Ibid. 416.
(9) 4 El. & Bl. 798.
(10) 1 H. & M. 130.
(11) 9 Ex. 84.

rally speaking, all corporations are bound by a covenant under their corporate seal, properly affixed, which is the legal mode of expressing the will of the entire body, and are bound as much as an individual is by his own deed. Contracts with partnerships stand upon a different footing. They relate to the power of one member of the partnership to bind the other, and constitute a branch of the law of principal and agent. In partnerships where all the members do not concur in the contract (and it is often that they do not) one partner may bind the other in all contracts within the scope of their ordinary partnership dealings; in those beyond, the individual partners making the contract are bound, not the other partners. But corporations, which are creations of law, are, when the seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by a contract in which all concurred." That was the case of a *boná fide* agreement between two railway companies as to the management of their special traffic, but there was nothing in the Act of Parliament that directly authorized the contract, yet it was held to be good. That definition has been adopted, in different words, but precisely the same in substance, in other cases: *Bateman* v. *The Mayor and Burgesses of Ashton-under-Lyne* (1). If the deed does that which Parliament actually prohibits, of course it is void, for, as Lord *Wensleydale* said, in *The Scottish North Eastern Railway Company* v. *Stewart* (2), "Railway Acts are enabling statutes, and what they enable the promoters to do may be done; what they prohibit is, of course, illegal."

The definition of the law stated by Lord Chief Justice *Jervis*, in *The East Anglian Railway Company* v. *The Eastern Counties Railway Company* (3), though professing to be founded on decisions in equity, as well as on principles of common law, carried the matter much farther than the authorities he referred to would warrant. He said, "If the company is a corporation only for a limited purpose, and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract, though it may make them all personally liable to perform such contract, would not bind them in their corporate capacity, or render

(1) 3 H. & N. 323. (2) 3 Macq. Sc. Ap. 382.
(3) 11 C. B. 775–809.

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liable their corporate funds." A doctrine so extensively stated cannot be sustained. If the subject of the contract is not expressly forbidden by the Act, the assent of all the shareholders to it must of necessity make it valid. Without having recourse to so sweeping a doctrine, it was clear that the contract in that case was one which could not be sustained. That brings the case to that of *The Eastern Counties Railway* v. *Hawkes* (1), which is decisive of the present. There, as here, was a company in existence promoting a new line, and the contract made for the purchase of land for that new line was held to be valid. All the points stated by Mr. Baron *Parke* in the observations already quoted came into consideration, and, in substance, all that he had said was affirmed.

The directors here were empowered to make the line. The lands here contracted for were lands that were necessary to enable them to make the line. The contract was clearly, therefore, within the object for which the application to Parliament was made. And it was entered into *bonâ fide.*

Mr. *Quain*, Q.C., and Mr. *A. L. Smith*, for the Defendants in Error:—

What are the terms of this alleged contract? They are, to do certain things if certain other things shall be done. If the Legislature chooses to pass a bill, the promoters say that they will take certain lands. It is, therefore, a conditional undertaking, made at a time when the promoters had no power to make any contract whatever. Railway Acts are merely permissive; but they permit things to be done after, not before, they are passed. The promoters must give notice of what they propose to do; but that does not incur liability, it only warns persons who may have opposite interests to appear and state those interests to Parliament, or, it may even be, to make conditional arrangements with the promoters. But such arrangements are not binding contracts. The promoters are not bound to make the proposed line of railway, even after they have got their bill. If they do make it, they must pay compensation for the injuries occasioned by making it; but they are not bound to make it, or to take the land for making

(1) 5 H. L. C. 331.

it. They cannot be bound to pay damages for the construction of a line which has never been constructed. The present supposed contract is no more than this: "We agree to pay money for land, whether we may want it or not; and we agree to pay compensation for damage, whether you may sustain any or not." That cannot be called a contract, and certainly cannot be treated as a contract to bind not merely those who enter into it, but others who may afterwards become interested, should Parliament concede the power to enter on the work. Yet this agreement to pay a large sum of money within three months after the happening of a certain event, is put forward as a binding contract. But, farther, this is not even a contract to take the land, but only to pay for it if the land should be taken. Again, here is a stipulation not to make the line without the consent of Sir *C. Taylor*, except in a certain way. But the Act says, that the line is to be made in a certain way, and takes no notice of Sir *C. Taylor's* consent. The supposed contract may, therefore, be to do something not in accordance with, perhaps in actual opposition to, the provisions of the Act. It is impossible to treat such an arrangement as a valid binding contract. The case of the *Eastern Counties Railway Company* v. *Hawkes* (1) cannot govern this case, for the difference between the two is considerable. There the contract was to pay for all the lands required, here it is to pay whether the lands are required or not, and whether the damage is done or not. For a similar reason the case of *The Scottish North Eastern Railway Company* v. *Stewart* (2), so much relied on by Mr. Justice *Willes* in the Court below, cannot affect the present; and in that very case it was distinctly declared that, though as a rule a corporation might bind itself by any contract under its common seal, it could not do so when the Act creating or regulating the company expressly, or by necessary implication, prohibited such contract. Surely an Act passed to enable a company to make a railway does by necessary implication prohibit such company from paying for lands which are not required for the purpose of making it. Here, too, is an agreement, not only to pay £2000 for land which may or may not be required, but a farther sum of £2000 is thrown in for possible inconvenience in sporting—inconvenience which may never be incurred. It is clear

(1) 5 H. L. C. 331. (2) 3 Macq. Sc. Ap. 382.

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that these payments are not to be made for lands taken, but for settlement of possible opposition. It is a bribe to buy off opposition, and as such is unlawful: *The Scottish North Eastern Railway Company* v. *Stewart* (1). It is not, as the 3rd section of this company's Act of 1864 requires, an agreement to take lands which are necessary for the construction of the railway. These lands of the Plaintiff are not necessary for the construction of the railway, and the agreement is only an agreement for buying off opposition, not for taking the lands. It is, therefore, void. According to the 11th section of the later Act obtained by the company, the money thereby authorized to be raised is to be applied only for the purposes authorized by that Act; but this money is agreed, so far as this agreement is concerned, to be applied without any such restriction. Then, again, this agreement makes no distinction between the existing capital of the company and that which is to be raised for the purposes of this extension. It is clear that the Acts give no power to the directors to apply the general funds of the company to the new extension. The new funds alone are to be applied to that. The agreement here is to pay in three months, which might be before the new funds could be raised. In no way whatever, therefore, is this supposed contract in accordance with the powers really or impliedly given to the directors by the Acts.

The case which really resembles the present is that of *Gage* v. *The Newmarket Railway Company* (2), and there Lord *Campbell* said, if they are to pay for lands on which they may never enter, surely that is a misappropriation of the funds of the company. Yet that is exactly what is agreed to be done here.

Finally, it is clear that this agreement is *ultrà vires*, because it is a positive undertaking to pay a specific sum of money to Sir *Charles Taylor*, without reference to the rights of other parties interested in the estate. He would, therefore, be entitled to put the money into his own pocket; but he being only tenant for life, that would be to the disinheritance of those who were entitled to the *corpus* of the estate, and who might afterwards lawfully claim compensation from the company. The directors have no power to subject the company to such a liability. The 73rd section of the *Lands Clauses Consolidation Act* requires that money paid under

(1) 3 Macq. Sc. Ap. 382.

(2) 18 Q. B. 457.

such circumstances shall be paid into the bank, or to trustees, and that it shall not be lawful for any contracting party not entitled to the estate absolutely to retain to his own use any portion of the sums so contracted to be paid. The contract to pay the money to Sir *Charles Taylor* is, therefore, in opposition to the provisions of the statute, and is void.

Mr. *Manisty* was not called on to reply.

THE LORD CHANCELLOR (Lord *Hatherley*) :—

This case comes before your Lordships on appeal from a decision of the Court of Exchequer Chamber, which reversed the decision of the Court of Exchequer. The action was brought by the present Appellant, Sir *Charles Taylor*, on a contract entered into between him and the Respondents, the directors of the *Chichester and Midhurst Railway Company*. The agreement was entered into by the Respondents under their common seal, and we are freed, therefore, from any question which might arise on a contract made by the promoters of an intended railway before the Act of Parliament, which was to give the company a legal existence, had been actually passed, as to which question, your Lordships are well aware, there has been a great deal of discussion and inquiry. This, however, is the agreement of the directors of an existing company itself. They were contemplating an application to Parliament by a bill already framed, as will appear by the statements in the contract, which was about to be presented to Parliament, and which might be subject to certain modifications or variations, but which, as it stood, contemplated taking power to pass through the property of the Appellant, Sir *Charles Taylor*, and, of course, passing through his property it was calculated to a certain extent to disturb the enjoyment of that property.

It seems that at the time they contemplated so passing through the property of Sir *Charles Taylor*, it was also supposed that twenty acres would be the amount of land belonging to him which they would require for the purposes of their railway, though they might require more, as to which provision was also made in the agreement they then entered into. That being the case, they approached the landowner, telling him all that I have stated, that

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they had this Act in contemplation, which Act would, of course, if it passed, give them full power of raising capital applicable to the purposes of the Act, and, amongst other purposes, applicable to the payment to Sir *Charles Taylor* of the purchase-money for his property, and any other compensation to which he might be entitled. Therefore, having this all before him, he is invited to enter into the agreement in question. He had stated that he was about to oppose the passing of the Act through Parliament, and, of course, as they were about to take part of his property he would have had an abundant *locus standi* to offer such grounds of opposition as he might be advised to offer. The agreement, therefore, is framed partly on the consideration of the property which he agrees to sell in the event of the Act passing, partly also in consideration of the withdrawal of his opposition to the intended bill.

Now, what was there in that state of circumstances, assuming the bill passed (the agreement being founded, as it is founded, wholly on the condition of its passing)—what was there on the face of this state of things to make it apparent to Sir *Charles Taylor* that he, on the one hand, was incompetent to enter into such a contract, or that the directors, on the other hand, were incompetent to enter into it on behalf of the company? Dependent as it was entirely on the passing of the Act, he would have a right to contemplate it exactly as if the Act had been passed, and the agreement had been entered into under its powers—though, in fact, the powers had to be obtained before the agreement could have any force or validity. He, accordingly, would find individuals incorporated as a company, with the ordinary powers of purchasing lands and paying compensation in respect of damage, paying it out of their funds. When I say out of their funds, I will state in a few moments what exactly constitutes the character of those funds. The company was in existence, its directors were persons capable of entering into engagements under a common seal—engagements conditioned, of course, upon obtaining powers, but in a state in which they could enter into a contract subject to that condition.

He found them in possession of an Act whereby they were authorized to make a certain line of railway; he found them about to extend that line. He must be taken to have made his engagement entirely subject to their obtaining the Act authorizing them

to do so. When we come to that Act we find that they meant to raise a larger amount of capital than they before possessed. Their first Act, of course, restrained the application of their capital to the purposes authorized by that Act. It is not necessary to read the clauses to that effect; they are always inserted in every Railway Act. Those clauses restrained them from applying their capital to anything but the original railway which, under its powers, they had brought into existence; so they sought new powers to raise additional capital to make a new line. The additional capital was to be added to their other capital. The expression is "adding to the shares of the original capital." But, of course, it must mean "adding the money to be raised by those shares." The expression "adding shares" itself would have no meaning in it. It can have no other meaning but that which I have stated, "adding the money to be raised by those new shares to the original capital, and forming all into one common fund." That Act would devote the new capital to the making of the new works; at least, there are clauses to that effect contained in the second Act. But with regard to the old capital, which by the original Act was limited to the purposes of that Act, and which was now being formed into one capital jointly with the new capital, there was the assertion or recital in the preamble of the new Act that the old company was ready to perform the new work, and there was a clause enabling the old company to perform it, and other clauses saying that the capital shall now be all one capital, and that the new work to be made shall be considered to be for all intents and purposes a part of the old work. With these clauses there would clearly be nothing improper, at all events, in the company applying the old capital to the new work if that should be necessary. But that is not necessary, because ample power was given to raise for the new work new capital, and it was for the new work that the property of Sir *Charles Taylor* was to be taken. Then, why should not he say this?—"When you have your capital all ready for the purpose of buying my property; when you have obtained authority to buy my property; as in the execution of that authority you will do me damage, I insist upon your making an engagement with me; otherwise I shall oppose your bill to the utmost. I insist upon an engagement that you

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will settle with me beforehand what the terms are upon which the purchase of my property shall be made, and what the terms are upon which compensation shall be made to me for any injury done *ultrà* the actual taking of my property, in order that I may avoid the expense, and the uncertainty also, of laying my claim before a jury." My Lords, I say that I see no possible objection to his doing that in the expectation of the Act passing; and I will proceed to consider the case entirely as if the agreement had been entered into after the Act had passed, for I think that is the true effect and the true consideration of the actual legal position of the parties. Supposing, then, the agreement to be entered into the day after the Act passed, what are the objections that are now alleged against it? The agreement in the second clause is positive and distinct, that the directors will take his property "in the like event." I will leave out the words "in the like event," and I will assume the bill to have passed. It is, that the company will purchase from Sir *Charles Taylor*, and that Sir *Charles Taylor* will sell to the company, "for the price of £2000 the several parcels of land, being portions of his estate, which will be required for the construction of the railway station, containing, in the whole, twenty acres, or thereabouts." That is not a contract to take so much "as may be required," or "if it may be required," because any ambiguity which might possibly exist in those words "which will be required" is entirely put an end to by the 6th clause of the agreement, which says, that "if they have occasion to purchase for the purposes of the said railway as now marked and shewn on the said plan hereto annexed, or in such other modified line as may be mutually agreed upon between the parties hereto, any farther or additional land of Sir *Charles Taylor* adjoining to the said pieces or parcels of land agreed to be sold as aforesaid, and within the limits of deviation, they are to pay him £100 an acre for that." Therefore I take that to be a clear and distinct agreement at once to purchase for the sum of £2000 land amounting to twenty acres, or thereabouts, inclusive, of course, of a reasonable fraction more or less, for the purpose of the line.

Then comes the 3rd clause, upon which the whole contest has arisen, and in respect of which in fact the action is brought:—[His Lordship read it (1).]

(1) See *ante*, p. 629.

Now, what are the objections that are raised to this? It is said, Here you are engaging to pay to Sir *Charles Taylor* within three months' time, whether you enter upon his land or not, whether, therefore, you occasion him any disturbance or not, this sum of £2000 absolutely. If, therefore, you do not enter upon the land, if you do not take it and purchase it and use it, and do not occasion him any loss and damage, then you are paying the assets of the company to him in a manner which is not authorized by the Act for any purpose whatever, because you acquire nothing, and therefore, as the Act directs that the assets of the company shall be solely applied to the making of the line, you are entering into an engagement by which those assets will be purely and simply wasted.

Now, can anyone conceive such a contest as that being raised? Look at the length to which it would carry us. Companies might well, as I venture to suggest, and indeed they generally do before entering upon the actual execution of their line, enter into contracts for the purchase of the land upon which the line is to be; and although of course it is not generally done all along the line at once, yet usually the line is let out in contracts, and the line being let out in contracts the mode of working these contracts is, that the proprietors of the lands through which the railway is to be made are dealt with to the extent, at all events, of the contract, and the land is agreed to be purchased by the company at an agreed price; or, if the parties differ, the matter is taken before a jury. It might just as well be said, when the jury has awarded the amount to be paid, if the directors change their minds, or from want of funds are unable to carry on their works, there exists no contract, and the landowner is not to be paid, for that then the money would all be wasted, as the railway could not be made. It might be called a wasteful and improvident contract, and it might be said that all these contracts must be read as containing an implied condition—"provided we take and use your land." In what condition would the landowners be placed if that were so? Would they enter into any contracts with the directors of a company if those directors were able to play fast and loose in that way, if they were able to say, "Should it suit our purpose to take and use the land, we will bind you down to an engagement by

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which you shall have this money for the land to be so taken and used by us; but if from any cause we do not want to take and use the land, you are not to be paid for it." Could such a contract ever be suggested or dreamt of?

It does not appear to me that it makes the least difference that this third head has reference to compensation for damage which it is said will never be done if the land is not taken. The argument applies just as much to the question of damage as to the question of land. In all matters relating to contracts with a landowner, and taking land from him, there are two separate questions which are distinctly provided for by the *Lands Clauses Act* and the *Railways Clauses Act*, namely, there is the taking of the land which has to be paid for, and there is the separate assessment of the damage which is to be done by the taking of the land. They are separate and distinct things. Although they are to be valued and estimated at one time in pursuance of the clauses of the *Railways Act*, yet they are to be estimated under two heads: the one is consequential upon the other. You agree upon the price of the land, or you go before a jury and the jurymen assess the price of the land, and also assess the damages consequent on the taking of the land, or, if you are minded to do so, you agree with the landowner for the land, and, as a necessary consequence, you agree with him at the same time as to the compensation for damage.

But, my Lords, I need not dwell upon this plain and obvious reasoning, which is consonant in every way with good sense with regard to contracts. Nobody ever heard that a contract could be a one-sided one, to be performed in the event of the purchaser of the land having the money, but to be abandoned if the purchase thinks it will not suit his purpose, to be, in fact, considered at an end as regards the vendor because the purchaser has changed his mind and does not wish to complete the contract. If authority were wanted, we have the strongest conceivable authority in the decision of your Lordships' House in the case of *The Great Eastern Railway* v. *Hawkes* (1), in which case the engagement was to pay, not within three but, within eighteen months. I think, however, that the time can make no difference in a subject of this kind. That was an engagement to pay within eighteen months £8000 for

(1) 5 H. L. C. 331.

the land, and £5000 as a compensation for personal annoyance and inconvenience and compulsory eviction. That is a case, too, of specific performance, a very much stronger case than this. Your Lordships determined that although the railway was not made, although, therefore, there was neither the actual taking of the land at the time, nor the personal annoyance and injury which was contemplated, still there was the engagement, there was the undertaking, and the company could not evade its engagement.

Now a second question has been raised to-day, which was not, I think, raised or suggested in that case, or in other cases which have occurred, namely, that under the 73rd clause of the *Lands Clauses Act*, a tenant for life is expressly forbidden from taking for his own use money which may be contracted to be paid, either in consideration of his not opposing a bill, or for any special damage to be done to himself with reference to the severance of the estate; in other words, for matters which do not clearly and distinctly concern him, and him alone. The object of that provision is, that he being placed, as the Act expressly places him, in the position of a person capable of entering into a contract with the company, he shall not, as between himself and the remainderman, be put into a situation of temptation whereby he may be likely to sacrifice those who are in remainder. In regard to such a contract, they are, no doubt, in the position of *cestuis que trust* to him, and he in that of a trustee for them. The intention of the Act is, that he shall not be put into the position of being tempted to misappropriate a portion of the funds, or to make a colourable bargain, merely for the purpose of putting a sum of money into his own pocket. But the very expressions in the Act shew that the Court of Chancery is to determine what portion is proper and right to be assigned to him; because part of the money paid may be in respect of his own personal grievances. And as regards his legal position, he is at law competent to enter into a contract for the whole estate, and for the whole damage by severance, and for the withdrawing of opposition as the condition of the contract that may be entered into. But if he does it, the whole bargain shall be for the benefit of the estate, and as between him and the remainderman it is to be settled and adjusted, if they cannot agree, by the power of the Court of Chancery. But that has nothing whatever to do with the relative

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positions of himself and the company. As between him and the company he is perfectly competent to contract; and as between him and the company the contract remains good and valid, whatever may be the grounds upon which he seeks for payment, and upon which he makes his demand.

Therefore, my Lords, it seems to me that the whole case stands simply thus: The directors are, no doubt, distinctly authorized to buy this estate; they are distinctly authorized to pay for severance or damage, and injury that may be done. Their Act gives them full powers so to do. They enter into a contract with the landowner that this payment shall be made. Then why should not the contract be carried into full and complete effect? I can see no reason why it should not.

I confess I have endeavoured to follow the judgment of the learned Judges in the Court of Exchequer Chamber from whom I have the misfortune to differ in this case. I cannot see any force in the reason which they there allege, namely, that it may possibly happen that all this money which these parties engaged to pay may be wasted, because for some reason or other they do not carry forward the undertaking. To hold that upon that ground the bargain is to be set aside would, as it appears to me, simply be to hold that, in every case as between vendor and purchaser, the purchaser might say at a given time, "I have repented of my bargain, and am desirous of being exonerated from it, and therefore I ought not to pay you because I shall get no consideration for my money." That would strike at the root of all contracts and engagements whatever, and the consequence would be most serious and mischievous to all railway companies. It would prevent at any time their entering into any bargain with landowners; for no one would be foolish enough to enter into a bargain with them if they were to be at liberty at any time to say, "This is only to hold good in case we pursue the work; in case we raise the money which we are not yet authorized to raise; or in case we think fit to take the land which we may have power to take." It would be found that railway companies would in all cases be compelled to go to juries, as they would no longer have the power of making bargains beforehand with the landowners. I agree with Mr. Justice *Willes* in thinking that it is inconceivable why com-

panies should not have the power to say, "It suits us to make a bargain, and to pay you the money down. It suits us to have the power of entering upon your lands at any time without being trespassers, and to have the power of taking possession at any moment without our contractors being subjected to any annoyance. We wish to purchase that right; and, therefore, we say, instead of entering upon your land and vexing and harassing you by the operations of our workmen, we will pay you in three months after we get our Act, and we shall then have it in our power at any time we like to enter upon the land as soon as we have made that payment." Why should not railway companies have the power to do that? What benefit, on the other hand, could possibly accrue to companies from its being held that they might thus take this unfair advantage of the opportunities afforded them after entering into immediate bargains? And what justification could your Lordships' House, as a Court of Justice, offer to a purchaser if you were to turn round upon him and say, "The bargain is to be simply a one-sided bargain for the benefit of the company, to be carried into full effect if the directors please; but not to be of any avail to the vendor if they repent of it, and wish to withdraw from it?"

I think, my Lords, therefore, that the judgment of the Court of Exchequer Chamber certainly ought to be reversed.

LORD WESTBURY:—

My Lords, this case was very ably and very ingeniously argued by the learned counsel for the Defendants in Error, but really it is impossible for anyone who rightly apprehends the meaning of the term *ultrà vires* to entertain any reasonable doubt upon the matter. In the first place, the *bona fides* of this agreement is not even attempted to be disputed. We must take it to have been really and truly that which it purports and is expressed to be. It is an agreement to arise and to take effect upon the passing of the bill then before Parliament. That was quite right. On the passing of the bill the agreement arose and became operative. It is therefore to be regarded by virtue of that stipulation as if it had been *de facto* made after the passing of that bill.

The agreement contains three main provisions: one is, that

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the company engages that it will make the line, and carry the line through the lands of the Appellant. It then contracts to purchase part of the Appellant's lands to the extent of twenty acres, and to pay for those lands £2000. And, in the third place, it engages to pay the Appellant £2000 for his eventual injury and damage by severance. That is a compendious description of the purposes mentioned in the third clause of the agreement.

Now, are these things within the powers given by the Act of Parliament? Unquestionably they are, every one of them. Every one of them is precisely what the company has the power of doing by virtue of the authority contained in the Act.

A great deal of difficulty arises in these cases from wandering away from the case we have to determine into a thousand and one other cases which have been decided. Many of these decided cases arose upon conditional agreements—agreements prefaced by an "if"—"if" the company shall make the line—"if" the company shall require the land. If an agreement of that kind is in terms made conditional of course the agreement does not arise or have any kind of operation until the precedent condition has been performed. There is nothing whatever of that kind in this agreement, but it is an absolute agreement. Neither can it be said that it is impliedly dependent upon the company making the line. Not that such an implication could properly be raised, but even the possibility of resorting to it is excluded here by the first term of the agreement, which binds the company to make the line. The importance of that stipulation is this, that it shews that the company did not intend to import any condition or any future possibility into the terms of the stipulation.

But then we come to this point, which is the only point upon which it was possible to hang an argument; can it be contended that directors of a railway company can never, before they commence their works, enter into an agreement to take land unless they make that agreement conditional upon the land being required? If such a proposition can be maintained, then undoubtedly it is unnecessary to inquire whether the agreement is in terms conditional or not, for the Act of Parliament would then disable them from entering into any but conditional agreements.

Now is there any trace of any such enactment in the Acts of

Parliament? Nothing of the kind. The landowner is empowered, and the directors are empowered, to enter into a private agreement without resorting to compulsory purchase. No time is stipulated for the making of that agreement. It is not incumbent upon the directors to wait and see what they may require when their line reaches a particular point of the lands of the individual with whom they have to deal, but they are at perfect liberty by the Act of Parliament to anticipate the making of the line and to enter into agreements accordingly, so long as the agreements affect a matter which comes clearly within the scope of their powers, and the lands are property which they are clearly empowered and authorized to take for the purposes of the railway. As it has been pointed out most conclusively by my noble and learned friend on the woolsack, it would be most mischievous to railway companies themselves if we were to construe Acts of Parliament as giving them only conditional and contingent powers; it would at once put an end to the possibility of their dealing advantageously and effectively with landowners. If they could enter only into conditional agreements, every landowner would wait until the railway approached his land. He would then have the directors at this disadvantage, that unless they yielded to his terms they would be unable to go on with their undertaking. It would therefore be a very unhappy thing for railway companies if, by our interpretation of the Act, we were to adopt what has been contended for, namely that the directors are not authorized to enter into any agreements but such as they shall hereafter be enabled to perform by making the railway for which the agreements refer.

But, then, is the agreement *ultrà vires* because it is not in terms conditional? That I have dealt with. Then is it *ultrà vires* because it makes the directors bound to pay the money without any reference to the particular source from which that money is to be derived? It has been supposed in the Court below that it must involve a breach of trust on the part of the directors, and it has been put thus:—The directors are bound to pay the money, consequently if they are unable to raise capital under the new Act of Parliament they will be compelled to pay the money out of the capital under the old Act of Parliament, and that will be a breach of trust. Accordingly it has been supposed that by reason

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of the possibility of such a breach of trust the agreement is incompetent from the commencement to the conclusion.

Now, it is impossible to imagine any greater misapprehension than that. First of all, we are not at liberty to entertain the hypothesis that the directors will have to resort to any other funds than the funds which they are enabled to raise under the Act of Parliament, by virtue of the powers of which this agreement was made. I asked, particularly, whether it was suggested that the capital had not been raised, or that it could not be raised, or that it had been raised and had been found insufficient. No answer was given to that except that no such case had arisen. Well, would it not be a most ridiculous thing, if I found directors empowered to take land, and empowered to raise money to pay for that land, and if it is not suggested to the Court that they could not raise the money, and would be unable to obtain the money, would it not, I say, be ridiculous in that state of things to suppose that an agreement which the directors had entered into was *ultrà vires* because, by possibility, they might not be able legitimately to raise the money to pay for it. It would stop all railway companies in all their transactions, for there is not a company, I suppose, that has not in the course of time added some new undertaking to the old one, and then it may or it may not have funds specially applicable to the new undertaking. But if it is authorized to add the new undertaking to the old undertaking, it is then authorized to apply to the new that which was previously applicable to the old undertaking; for if the new be made part of the old, that which might originally be applied to the old, may now be applied to the collective subjects constituted of the two things, namely, the old undertaking and the additional one.

Under this particular Act of Parliament there is no pretext for talking of a breach of trust or want of powers. The old company, being an existing company, is authorized by the Act of Parliament to add to its existing undertaking a new specific and extended line of railway; and the new and extended portion becomes part of the original undertaking. The directors are authorized, also, to raise new capital. And the new capital is to be added to the old capital. There can be no pretext, therefore, for saying that if the directors entered into a contract of the kind which you find here before the

new capital was raised, it would be beyond their powers or would be a breach of trust. But they entered into the agreement having regard to their power of raising money, and we have no right to assume that that power will not now be effectually exercised upon that hypothesis. Therefore we have no right whatever to assume that the directors may be driven to dedicate to the purposes of this agreement any other funds than those that may be legitimately raised under the powers given to them for that purpose. The whole thing is mere imagination about the agreement being *ultrà vires*, and about the company committing a breach of trust. It proceeds only from a want of more accurately understanding the meaning of terms and the rules by which they are applied.

Then to that must be added another extraordinary illusion. It was argued in the Court below, that inasmuch as the agreement in the 3rd section is in terms for the payment of the £2000 to Sir *Charles Taylor*, therefore the money was to be put into his pocket to the disinheritance of the persons entitled to the *corpus* of the estate; and that the railway directors would render themselves liable to another claim on the part of the persons entitled to the inheritance. That is an utter confusion with respect to the provisions introduced for the purpose of protecting persons entitled to remainder against the tenant for life, and which apply only to parties standing in that position or relation. I say it is a confusion to apply these provisions to the contract as between the tenant for life and the railway company. The tenant for life is perfectly authorized to enter into the agreement, stipulating that so much money shall be paid for the damage by severance; but the money, if received by him, is received upon trust for the benefit of himself and the parties entitled to the inheritance, which trust and the mode of executing it are defined by the Act of Parliament. This has no application to the railway company. The directors, if well advised, will take care to have the money stipulated to be paid to the tenant for life paid into the Court of Chancery. The payment into the Court of Chancery, under the Act of Parliament, will be a fulfilment of the agreement to pay the tenant for life. This is only another instance of misconception of the nature of the provisions applicable to this subject; these provisions in effect applying only as between the parties entitled

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to the inheritance, and not at all affecting the contract as between the tenant for life and the company. I regret that Sir *Charles Taylor* has been put to the necessity of coming here to correct this misapprehension. The case is an extremely clear one, and I am clearly of opinion, with my noble and learned friend, that the judgment of the Court of Exchequer Chamber must be reversed, and judgment entered for the Plaintiff in the original action.

LORD COLONSAY entirely concurred.

Judgment of the Court of Exchequer Chamber reversed, and ordered to be entered for the Plaintiff in the original action.

Lords' Journals, 1st July, 1870.

Attorneys for Plaintiff in Error: *Rogerson & Ford.*
Attorney for Defendants in Error: *Faithfull.*

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May 7.

THE DIRECTORS, &C., OF THE GREAT WESTERN RAILWAY COMPANY . . } APPELLANTS;

AND

GEORGE GREY ROUS AND OTHERS, AND THE EBBW VALE COMPANY (LIMITED) . . . . . } RESPONDENTS.

12 Eq 413-5-6,
8 Ch. 764.

Mines—Royalty—Covenant.

L., the owner of land with mines underneath the surface, granted a lease of part of his land known as *A.*, and the mines under it, to a company known as *P.*, carrying on the manufacture of iron.

The lease contained this covenant: "yielding and paying to the lessor, his heirs, &c., for every quantity of 2520 lbs. of coal, ironstone, &c., the produce of any lands or mines not intended to be included in the present demise, but which shall be raised within the distance of twenty miles from any part of the premises hereinbefore expressed to be demised, and shall be brought *through*, *over*, or *under* the said lands, &c., the royalty or sum of one half-penny." *P.* afterwards granted an under-lease of a part of the surface of the land *A.* to a railway company, which made sidings thereon, for the purpose of more conveniently and safely shunting trains for a time, before forwarding them to their destination. Trains containing minerals raised

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within the twenty miles (often mixed with minerals in no way coming within the words of the covenant, and sent by other companies upon the line) were frequently, for safety and convenience, shunted for a time on the sidings formed on the land *A.*, and afterwards taken out and conveyed to their destination:—

Held (affirming the judgment of the Court below), that the minerals raised within the described distance did come within the words of the covenant, even though brought on the land only for the temporary purpose of being shunted there, and were therefore liable to the payment of the royalty.

THIS was an appeal against a decree of Vice-Chancellor *Wood*, made in March, 1868, by which the Appellants were declared bound to pay a sum of one halfpenny on every 2520 lbs. weight of coal brought upon lands leased to persons of whom the Appellants were the under-lessees; and an account had been directed.

Mr. *Capel Hanbury Leigh*, of *Pontypool Park*, in the county of *Monmouth*, on the 27th of July, 1852, granted a lease, to commence as from May, 1851, for ninety-nine years, to *Edward Bagnall Dimmack* and others (who were, in fact, shareholders in, and trustees for, the *Pontypool Iron Company*), of certain lands, with the mines thereunder, to him belonging, near *Pontypool*. For the purposes of this case the lands may be designated as *A*. The lessees were to have power to make waggon-roads, railways, tramways, &c., "in, through, under, over, or upon" the lands *A*. Certain rents and royalties were settled as payable for these lands; and there was then this special covenant: "And yielding and paying unto the said *C. H. Leigh*, his heirs and assigns, yearly and every year during the said term for every quantity of 2520 lbs. of coal, iron-stone, fireclay, limestone, building stone, or any other mines or minerals, the produce of any lands or mines not intended to be included in the present demise, but which shall be raised within the distance of twenty miles from any part of the said premises hereinbefore expressed to be demised, and shall be brought *through*, *over*, or *under* the said lands, mines, hereditaments, and premises comprised in the first and second schedules to these presents, the royalty or sum of one halfpenny." Accounts were to be kept.

The interest of the *Pontypool Company* in this lease was afterwards transferred to the *Ebbw Vale Company*.

In August, 1864, a serious railway mischief occurred at the *Pontypool* station of the *Great Western Railway*, and was attributed

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to the insufficient accommodation there in the way of sidings. To prevent the recurrence of such a mischief the *Great Western Company* entered into negotiations with the *Pontypool Company* and the *Ebbw Vale Company*, to take some of the land the subject of the above lease, and these negotiations resulted in an agreement to take the lands marked *A*. On the lands thus obtained from the *Pontypool Company* the directors of the *Great Western Railway Company* erected sidings and shuntings and a large carriage shed; and these lands have since been used as sidings only, waggons arriving at the *Pontypool Road* station being temporarily shunted into them till the convenient and safe management of the traffic enables them to be brought again on the main line and forwarded to their destination. Many of these waggons contain minerals raised from part of the demised lands, from lands within twenty miles, and from lands situated entirely beyond that distance. Many of the waggons, too, containing them belong to other companies than the *Great Western*, and merely pass along the *Great Western* line, where they are for a time shunted on the sidings erected on the lands *A*., and are afterwards forwarded as already described. No separate accounts of the minerals thus diversely supplied to the waggons which are run upon the sidings have ever been kept. In 1865, an Act relating to the management of the business of the *Great Western Railway* was passed; and, at the instance of the trustees of Mr. *Leigh* (who himself was dead), a clause (13) was introduced into the Act in the following terms: "Nothing in this Act contained shall either prejudice or affect the rights of the trustees of *C. H. Leigh*, Esq., under the lease to Messrs. *Dimmack*, &c., dated the 27th of July, 1852, in so far as relates to the lands to be acquired under the provisions of this Act." Another clause (14) was introduced by the *Ebbw Vale Company* in this form: "As from and after the time when the railway company had possession of the lands" [the demised lands *A*.] "they shall indemnify the *Ebbw Vale Company*, or other the lessees of those lands, from all liability in respect of those lands under the covenants, conditions, reservations, provisoes, and agreements contained in the lease under which the lands are held from the late *C. H. Leigh*, Esq."

The trustees under Mr. *Leigh's* will claimed to be paid this royalty of one halfpenny for all minerals coming within the

description given in the lease and brought upon the land *A.*, and filed a bill against the *Ebbw Vale Company* and the *Great Western Railway Company* to enforce this claim and to have accounts directed. Answers were put in, which set forth the matters already stated; and evidence was taken on both sides, and a motion was made for a decree. The case was heard upon this motion upon the 4th of March, 1868, when a decree was made granting the prayer of the bill, and accounts were directed. This appeal was then brought.

Sir *J. Karslake*, Q.C., and Mr. *Thomas Stevens*, for the Appellants:—

The Appellants are not liable under this covenant; they and their business do not come within the meaning of it. The minerals here are merely brought on the land, and there left for a short time, but cannot be said to traverse it, to pass *through* it, either *under* or *over* it, so that they are in no way within the words of the covenant. The object of the covenant related to commercial competition from minerals brought from other places and used by a mining company on the land of the lessor, but had no reference whatever to the mere movement of minerals by a railway company. It is impossible for a railway company to keep such accounts as are here asked for.

There is here no privity of contract or covenant between the original lessor and the assignee of the lessee. An agreement to take an assignment of a lease, followed by possession, will not give the lessor a right to sue the equitable assignee in Equity, on the covenants in the lease: *Cox* v. *Bishop* (1).

Sir *R. Palmer*, Q.C., and Mr. *E. Leigh Pemberton*, for the trustees and beneficiaries:—

The lessees and all who claim under them are liable upon the covenants contained in this lease. It does not matter whether the minerals are brought upon the land for the purpose of manufacture or of sale by an iron company, or for the purpose of transit by a railway company; they are equally within the words of the covenant. It is impossible to say that minerals brought into the sidings and left there, and then carried forward, are not brought "through,

(1) 8 De G. M. & G. 815.

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under, or over" the lands on which those sidings are formed. The interest and liability of the *Ebbw Vale Company* were assumed by the Appellants when they obtained possession of the lands, and they are bound by the covenants of their lessors entered into in respect of these lands.

Mr. *Gordon Whitbread* appeared for the *Ebbw Vale Company*, but did not address the House.

Sir *J. Karslake* replied.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, the present appeal came before me in the first instance, and but that I understand there is no difference of opinion between us, I should avoid first addressing your Lordships upon the question whether or not the decision below should be affirmed. I confess I have not seen any reason during the able argument which we have heard to change the view which in the first instance I took of this case. My construction of the covenant was this:—The gentlemen who were demising the land, had upon that land, as things then stood, considerable and important works. They were about to demise the surface for the purpose of enabling others to carry on certain mineral works, and, of course, desired to obtain a royalty in respect of the minerals so worked. They had it, therefore, in view to protect themselves, in every way they could, against anything which might interfere with the payment to them of that royalty; and also, as it appears to me, to secure for their minerals, which would thus be worked by the lessee under the lease, the best price that could be had, with as little competition as possible against themselves.

For that purpose the peculiar covenant is introduced which is now in question, and the covenant, or, rather, the render of the rent, is placed in this way; that you shall not only pay a royalty upon all the coals and minerals which you work out of our mines, but you shall also agree to this special proviso:—[His Lordship read it, see *ante*, p. 651.]

Now it appears to me that by requiring that render the lessors were protecting themselves to the extent of loading other minerals, which could come into competition with theirs, with a sum of one

halfpenny per ton—the number of pounds mentioned in that covenant being a measure peculiar to the district for a ton. The Respondents in enforcing that covenant are thereby protecting themselves as to the use of their own minerals, and the sale of their own minerals in the market; and at the same time protecting themselves against those more distant minerals which might come into competition with them, either upon their own property, or in any other market which was a market for their own property. Therefore, as Sir *John Karslake* put it, if you were to say that their only object was to prevent other minerals going to markets to which their own minerals were sent, we must suppose that they would be careless and indifferent to the use to any extent of the minerals of their neighbours anywhere within twenty miles round upon the very property they were demising. I apprehend that if the object was, as it was admitted to be by Sir *John Karslake*, upon the face of this render, to secure what may be called a protective duty as against foreign minerals, one cannot suppose that lessors would be less careful to have protection as regards the quantity of minerals that would be required for working the large works and manufactories contemplated upon the surface of their own ground, than they were with reference to protecting themselves in other markets where there would be a large number of consumers who would have a choice between their minerals and the minerals of their competitors. In other words, we cannot suppose that as regards the custom of which they might consider themselves sure, namely, that at home, they would be indifferent, whereas, as regards possible customers in the general market they would take this precaution. I apprehend that this proviso was intended to meet competition of any kind, whether in their own home, where the demised property was, or in external markets.

Approaching the question from that point of view it is clear that the natural reading of these words, "through, over, or under," would accomplish the object they had before them—especially when you find a disjunctive between the second and third prepositions (three prepositions being used)—whether it be "through," or whether it be "over," or whether it be "under"—not reading "through" and then reading the other words, as it were, in a parenthesis—whether that throughness be over or under the lands. It

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was said, indeed, that if you so read it you make the word "through" altogether superfluous, because when you say "over" it, or "under" it, that includes everything. But I think there was a sufficient answer made to that by Sir *Roundell Palmer*, namely, that it might be thought *primâ facie* that their object was to prevent minerals coming either on the surface or under the surface. And with regard to their coming on to the property it might be said, "We are going to consume these upon the property, we are not in any way in competition with you." But for the purpose of meeting any such observation as that, the lessors say, whether you bring them on to our property and use them there, or whether you carry them on to an external market, you shall pay. The whole is emphasised, therefore, in that way—you shall not carry them over, you shall not carry them under, and you shall not carry them through.

Sir *John Karslake* pressed us very much with the observation (and at first I thought there was some degree of force in it), that the word "upon" had been used throughout the lease as meaning that which would be expressive of something placed upon the surface where nothing more was said about it. And that here the word was "over" not "upon," implying the transit or throughness of the conveyance of the goods, so that they should not be carried in this throughness and in this entirety over or under the surface. Whereas if it had been intended to say that they shall not come upon the surface, the word "upon," would have been used in the same way as in other parts of the lease it is used. But it is curious enough that with regard to the same subject matter you have the word "upon" used, and in the very same sense, and in the same passage, you have the word "over." It runs thus: "And also with full and exclusive power and authority to make waggon-roads, railways, tramroads, and other ways and roads in, through, under, over, or upon" (here all the words come together) "any of the lands *A.*, and the others, for all purposes whatsoever: And also with full power and authority, so far as the said *Capel Hanbury Leigh* can or may lawfully grant the same as aforesaid, to make such waggon-roads, railways, tramroads, and other ways and roads in, through, or over any of the said lands" (specifying them), "and to do all such other acts and things as shall be necessary." In truth, they seem to use the two words "over" and "upon" in

pretty much the same sense, the one and the other synonymously, without any very great regard to distinguishing between the two uses. Of course, as I said before, "over" must mean upon the surface, it cannot mean anything by way of a bridge. I read it simply thus: "You shall not take any property of my rivals through my land; you shall not take any property of my rivals over or upon my land; you shall not take any property of my rivals under my land." The word "brought" I should comment upon as having a stronger force with regard to its construction than the word "carry," because the words "carried though, over, or under," might be regarded as indicating that transit only was the subject matter thought of, whereas the word "brought" is a very appropriate word, applying to minerals brought upon the property and then used there.

I took occasion, when the case first came before me, to say that, if the construction of the present Appellants was to prevail, it must be a necessary consequence that it might suit the lessees not only to use foreign materials entirely, and to say: "We will pay no royalty upon the foreign materials we use, because we do not carry them through, but we only bring them upon our own property and there use them;" or the property might some day come into the hands of the railway directors, who might say: "We are not using them in our own manufacture, we will bring them to a depôt upon our land, and at that depôt we will offer them for sale, and other people may buy them at that depôt; and as we have not carried them *through*, but simply carried them *on* to our lands and lodged them there, we shall not be liable for any payment in respect of those goods." Of course the whole object of the lessors in protecting themselves by this render would be frustrated if any such construction should be put upon the render as that.

Upon these grounds I think that the decision ought to be affirmed, and the appeal dismissed with costs.

LORD CHELMSFORD concurred.

LORD WESTBURY:—

My Lords, it is not my habit to read these cases previously to the hearing at the Bar for fear of raising an impression in my own

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mind that might interfere with their impartial consideration. I must confess when this case was opened I received two very strong impressions. One was, that it was the intent and object of these parties, the lessors, to require for the right of way over any part of the demised lands in respect to foreign minerals—that is, minerals raised within twenty miles—a separate royalty or rent. And I thought, farther, that there had been no obligation incurred by the railway company to pay that rent, inasmuch as a great part of these minerals had never traversed any part of the demised lands. I also received the impression that a very unconscionable use was made of this covenant by the lessors, even if it received their interpretation, by their demand from the railway company of the whole of this rent for the merely temporary deposit of foreign coal upon a part of the demised lands.

But, my Lords, my first impression undoubtedly has been removed by a consideration of the whole of the case; and I think it plain that the main object of the lessors was this—that, inasmuch as great smelting works were erected on, and were to be carried on, upon part of the demised lands, which are very extensive, and under which there were large seams of coal, their object was to ensure the lessees working these coals, and using them in the works carried on upon those lands, and that for that purpose it was their object to impose a species of tax upon any foreign coal brought on the lands. That consideration compelled me to come to the conclusion that the construction of the covenant suggested by the Appellants could not be maintained; for the Appellants' construction resolved itself into this—that no toll could be required in respect of coal that was merely brought on the land, and did not traverse the land. The Appellants said it was intended to create a right to demand a toll upon "through" coal only, and that this coal has never traversed the lands, and therefore ought not to pay toll. And in addition to that construction, they contend that the word "through" is the governing word; and that the words "over" and "under" are only intended to denote the manner in which the coal might traverse the lands. I cannot accept that, because I see plainly that it was intended to prevent foreign coal being brought into competition with what I may call home or domestic coal; and if the covenant received the

interpretation contended for by the Appellants, it would follow that the lessees would be at liberty to bring on the lands for home consumption any quantity of foreign coal without paying any render or rent in respect thereof.

Being compelled, then, to arrive at the conclusion that the covenant was intended to strike at coal merely brought on the land, and, in that sense, brought "over" the land, although the coal did not enter at one end of the demised lands and go out at the other, I am compelled to arrive at the conclusion that the Appellants are wrong in the interpretation they put on the words. Then, can I limit the meaning of these words by having regard to what was probably the intent with which they were introduced? And can I hold that what was done by the railway company is not an infraction of the spirit of the agreement between the lessors and lessees, and ought not to be taken to amount to an infraction of the covenant? It is very difficult for a Court of justice to undertake the duty of doing any such thing if the instrument does not furnish you, *aliunde* the covenant, with the means of restricting the covenant. The safer and wiser course for a Court of justice is to follow the plain literal meaning and interpretation of the words used, unless it can clearly find in some other part of the instrument a rule for their construction that overrules the obligation of abiding by the literal meaning, and enables you to give a more or less extended interpretation of the words.

Now I have no doubt that the demand here made is one which is entirely contrary to the spirit of the agreement; and I hold it to be a very unreasonable demand. But it is a demand that clearly falls within the letter of the covenant. For even the coal in the waggons, which are shunted off the main line of railway on to this siding, and which remain there merely for an hour, with the best of objects, to prevent the possibility of collision or danger —those coals remaining on the land even for that short time are certainly coals brought over the land; for if they are brought over any part of the land they come within the meaning of the covenant. Can I, then, restrict the language of the covenant? I am afraid not. You must hold that if the covenant applies, according to its literal meaning, to the case that has occurred, namely, to coals brought on the land merely for temporary deposit, the obligation

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to pay for the use of the land applies, although you believe that such was never, for one moment, in the contemplation of the parties when the agreement was made. It is, indeed, true, as my noble and learned friend on the woolsack has suggested, that this siding thus used for a temporary purpose does, in a remote degree, facilitate the transmission of foreign coals towards the port of loading—the port of *Newport*, which is also a port of sale; and in that remote sense the land may be said to be used for the transmission of the coal which it was the desire of the lessors should not be allowed to compete with their coal on the demised lands. But that is a competition in so remote a degree that it can hardly be, in reason and substance, regarded as a thing intended to be struck at by the covenant; yet I cannot find in the lease anything that enables me to put a different interpretation on the words of the covenant from the literal meaning which the words bear. I am compelled, therefore, to bow to the decision advised by my noble and learned friend. At the same time I am convinced in my own mind that the literal meaning is here used for a purpose which it was never intended to have; and I should be very glad, therefore, if we could do it without injury to general principles, to dismiss this appeal without costs on the ground I have stated. But here, again, general rules come in to prevent our yielding in the particular case to what we might desire to do; and therefore I am obliged, by a regard to general principles, to agree with my noble and learned friend that this appeal must be dismissed, and that, for the sake of the general rule, it must be dismissed with costs.

Decree affirmed, and appeal dismissed with costs.

Lords' Journals, 7th April, 1870.

Solicitors for the Appellants: *Young, Maples, Teesdale, & Nelson.*

Solicitors for the Respondents: *Barlow, Bowling, & Williams*; and *J. Fraser.*

THE DUKE OF NEWCASTLE . . . . . APPELLANT;

AND

ROBERT MORRIS . . . . . RESPONDENT.

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July 5, 7.

Statute—Bankruptcy—Non-Trader—Privilege of Parliament.

3 P.C. 326

Where persons having, as a class, certain privileges, are by statute subjected to certain liabilities, their privileges being expressly reserved to them, and other persons having the same privileges, are afterwards, as a class, subjected to the same liabilities, but nothing is said of their privileges, these privileges still continue to exist.

Privilege of Parliament exists at Common Law, and is not taken away by implication because a statute makes persons enjoying it subject to the law of bankruptcy, and does not specially reserve the privilege.

Before the *Bankruptcy Act* of 1861 traders having privilege of Parliament were rendered liable to the bankrupt laws, but the privilege of freedom from personal arrest was expressly reserved to them. By the 69th section of the Act of 1861 all debtors (non-traders as well as traders) were made liable to the bankrupt laws. Nothing was said in the Act to reserve to debtors who had privilege of Parliament their freedom from personal arrest:—

Held, that the statute included all debtors whatever, but that such debtors as were entitled to privilege of Parliament still continued to enjoy its protection.

ON the 21st of June, 1869, the Respondent filed his Petition in the usual form in the Court of Chancery, praying that an adjudication in bankruptcy might be made, under the *Bankruptcy Act* of 1861, the 24 & 25 Vict. c. 134, s. 69 (1), against the Appellant. It was contended, in answer, that the Appellant, being a non-trader, a peer of the realm, and enjoying privilege of Parliament, was not subject to an adjudication in bankruptcy. Mr. Commissioner *Winslow* adopted this view of the case, and dismissed the Petition. On appeal to Lord Justice *Giffard*, the order of Commissioner *Winslow* was, on the 20th of November, 1869, discharged, and the Petition remitted back for hearing (2). The present appeal was then brought.

(1) "All debtors whether traders or not shall be subject to the provisions of this Act; but no debtor who is not a trader shall be adjudged bankrupt except in respect of some one of the acts of bankruptcy hereinafter described as applicable to a non-trader."

(2) Law Rep. 5 Ch. Ap. 172.

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Sir *R. Palmer*, Q.C., and Mr. *Ernest H. Reed*, for the Appellant :—

Privilege of Parliament is inconsistent with liability to the bankrupt law. Wherever, therefore, the Legislature has intended that a person having privilege of Parliament should be liable to be declared a bankrupt, it has expressed that intention in clear terms, has specified the particular cases in which, and the circumstances under which, the bankruptcy should be adjudged, and has accompanied its special directions with a formal saving of the Parliamentary privilege. All these things are wanting in the statute of 1861. There is a mere enactment that all debtors shall be liable to be declared bankrupts; non-traders are, for the first time, introduced as liable to the bankrupt law, and there is no mention whatever of any class of persons who, in consequence of enjoying certain well-established privileges, have always been exempt from the operation of those laws.

This Parliamentary privilege exists by the Common Law, and cannot, therefore, be taken away, in part or in the whole, except by express and direct legislation. *Blackstone* (1) describes the privileges of Parliament as being "large and indefinite," and as being capable of being determined by Parliament alone; and among these privileges that of personal freedom from arrest is most important. *Bacon's* Abridgment (2) is to the same effect; and these Parliamentary privileges were fully recognised in the *Privilege Case* (3). Of course the other subjects of the realm are not to be left without legal remedies for legal claims they may have against members of either House of Parliament; but the mode of proceeding in such cases has always been the subject of special legislation. The 10 Geo. 3, c. 50, is an instance of this, and there are many others. [The 1 Jac. 1, c. 13; 12 & 13 Will. 3, c. 3; and 2 Anne, c. 15, were specially referred to.] The 4 Geo. 3, c. 33, was the first statute that subjected persons having privilege of Parliament to the operation of the bankrupt law, but that statute carefully prescribed the times and the forms of the proceedings, and, in sect. 4, expressly enacted that "nothing in this Act shall subject any person entitled to privilege of Parliament to be arrested or imprisoned during the time of such privilege, except in cases made felonies by the Acts relating to bankruptcy." That form

(1) 1 Comm. 164. (2) Tit. Privilege, C. (3) Sir *W. Jones*, 154.

had been followed in all similar statutes since that time. It is clear, therefore, that whenever the Legislature intended that a person having privilege of Parliament was to be brought within the operation of a statute, it took care to guard against the violation of that privilege itself. The 12 & 13 Vict. c. 106 (the *Bankruptcy Act* of 1849) contained (sect. 66) an enactment precisely similar to that in the 4 Geo. 3, c. 33, s. 4; and did so, of course, because by the 77th and 78th sections persons having privilege of Parliament were, according to certain forms therein prescribed, made subject to the bankrupt laws. The 24 & 25 Vict. c. 134 (the *Bankruptcy Act* of 1861), the Act now in question, repealed a great many of the sections of the preceding statute, but incorporated others into its own provisions. Among those which were to be read as part of the more recent Act were the 66th, the 77th, and the 78th sections. The principles by which statutes of this kind were to be construed were stated in *Hawkins* v. *Gathercole* (1), and in the case of *Ex parte Bristow* (2) Lord *Cairns* refused so to incorporate all the unrepealed provisions of the Act of 1849 into the Act of 1861 as to make the non-trader, who was then first rendered liable to bankruptcy, subject to all the provisions which, by sect. 101 of the Act of 1849, had been directed against the trader alone. [THE LORD CHANCELLOR:—In all former cases the Legislature had only applied itself to dealing with the trader, because until the Act of 1861 none but a trader could be made a bankrupt.] But the sect. 221 of that Act, and its sub-sections, appear to include acts which may be done by all persons whatever, whether privileged or unprivileged. It was necessary, following the rule of previous legislation, to have an express provision to deal with members of Parliament, but if the 69th section is taken to be construed as including a person enjoying Parliamentary privilege, then he is dealt with as a private individual and no more, and his privilege is taken away by mere inferential construction. So to construe the section would include all persons whatever, and would make even princes of the royal blood liable to the law of bankruptcy. [THE LORD CHANCELLOR:—No. Such a liability must be specially provided for by the members of the royal family being expressly named.] Many of

(1) 6 De G. M. & G. 1. (2) Law Rep. 3 Ch. App. 247.

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the provisions of the general law would never have been applicable to a person having Parliamentary privilege. That is shewn by reference to some of the provisions of the Act of 1849. For example, by the 119th section of that Act, any bankrupt keeping out of the way might have been arrested. That could not have been intended to apply to such persons, and the same observation may be made as to several other sections of that statute. [THE LORD CHANCELLOR:—The statute 1 & 2 Vict. c. 110, gives some large remedies against the real estates of judgment debtors and against their personal property, but contains a clause by which those who take a debtor's person in execution lose the benefit of these special remedies. Would you say that, as a person having privilege of Parliament cannot have his person taken in execution, therefore these special remedies were inapplicable to his estates?] Whatever may be said on that point, it is clear that a member of Parliament, not being liable to arrest, cannot come within any clauses the provisions of which are founded on the power to arrest. In all the statutes, from the earliest time to the present (the statute of 1861 omitting all mention of the matter), the Legislature in making a person with privilege of Parliament liable to the bankrupt law has coupled that liability with a declaration that his person shall be free from arrest. By omitting all mention of this matter, the statute of 1861 could not have created a liability which never before existed. It cannot, therefore, have intended to deal with persons having privilege of Parliament. General words, a mere indefinite phrase, cannot have the effect of taking away this long and carefully-guarded privilege. If that could be so, then some of the other provisions of the statute would be useless, and even superfluous. The Legislature has itself strengthened this argument, and shewn what the previous law was, by having made a new enactment entirely at variance with that law. Thus the 120th section of the 32 & 33 Vict. c. 71 (the Act of 1869), for the first time declares that "If a person having privilege of Parliament commits an act of bankruptcy he may be dealt with under this Act in like manner as if he had not such privilege." This is itself a declaration that till that Act he could not be so dealt with. The case of *Meymot* (1) really

(1) 1 Atk. 196-201.

does not affect this question. No one can tell whether the commission there was a friendly commission or not; all that is known is, that a clergyman was not relieved against a commission of bankruptcy, but was left to his remedy at law. But when the case is properly considered it ceases to bear the authority which has been attributed to it. The law to make a peer or a member of Parliament liable to bankruptcy was there spoken of as if perfectly clear and settled. Yet that was a case which occurred in 1747, and in 1763 the Legislature itself declared in the Act of 4 Geo. 3, c. 33, that "Whereas merchants, &c., within the descriptions of the statutes relating to bankrupts having privilege of Parliament are not compellable to pay their just debts, or to become bankrupts, by reason of the freedom of their persons from arrest upon civil process, and some doubts have also arisen whether in cases of bankruptcy a commission can be sued out during the continuance of such privilege." That declaration of the Legislature destroyed all the value of the *dictum* (1) (for it was no more) which had fallen from Lord *Hardwicke*. The case of *Harris* v. *Lord Mountjoy* (2), does not assist the other side, for that case was fully considered by Lord Chief Justice *Tindal* in *Cassidy* v. *Steuart* (3), where the Court held most clearly that a *ca. sa.* against a member of Parliament must be set aside as irregular, though it was expressly and avowedly issued not to be put in force against his person, but only, when his privilege had expired, to serve as the foundation for proceedings to outlawry. That case shews that, even as a mere preliminary form, a recognised proceeding at law cannot be employed where its object is to do indirectly that which the law has not directly authorized. By the statute of 1861, certain proceedings alone are to be taken; the 76th section specially prescribes them, and none other can be adopted, and that section must apply equally to traders and non-

(1) "A commission of bankruptcy formerly issued against a peer, an Earl of *Suffolk*, for trading in wines, and though there may be some particular powers that commissioners of bankruptcy could not exercise against a peer, yet notwithstanding this, he may be liable to a commission of bankruptcy if he will trade, and so may a member of the House of Commons, though, while he continues a member, there are some particular powers of commissioners that cannot be exercised:" 1 Atk. 201.

(2) 2 Leon. 173.

(3) 2 Man. & G. 437.

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traders. Now those proceedings are, according to the principle laid down in the case just cited, not capable of being applied to persons having privilege of Parliament, and therefore it is clear that the Legislature could not, by the 69th section of the Act of 1861, contemplate making peers or members of the House of Commons subject to the provisions of the law of bankruptcy.

The Court will not under such circumstances give the words of the 69th section the extraordinary interpretation now sought to be put upon them. If that should be done this consequence would follow, that under the 221st section the privileged person might be subjected to punishment by imprisonment, which never could have been intended. As to these matters, this statute is a penal statute, and ought therefore to be strictly construed. Yet the argument on the other side, disregarding that principle of construction, seeks to have the meaning of the words enlarged, and to substitute, in effect, in the 69th section of the statute, the word "person" for those of "trader" and "non-trader." That cannot be done, and a non-trader having privilege of Parliament is not subject to the provisions of the section.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the Respondent, were not called on.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, this case has been extremely ably argued before us, both by Sir *Roundell Palmer*, and by Mr. *Reed* whose very ingenious argument we have listened to with great pleasure; but at the same time it has failed, I think, to convince any of your Lordships that there can be any sound ground for saying that those debtors who, if traders, were subject to the operation of the Bankruptcy Law of 1849, are to be exempted from the operation of the Act of 1861, which declares that all debtors, whether traders or not, shall be subject to its operation, simply on the ground of there not being a specific provision as to immunity from arrest which they before enjoyed; arrest being one of the consequences of bankruptcy.

The whole of the argument has really been rested upon this, which appears to me to be an unsound foundation. The privilege

of Parliament, which in the case of a peer is clearly a privilege not confined to the actual sitting of Parliament, the privilege by which those who are members of either House of Parliament are free from arrest in respect of debt, is a privilege which has been recognised as being founded upon Common Law. No doubt it did stand upon the Common Law, and in the subsequent legislation on the subject care was taken that that Common Law privilege should be protected by special clauses inserted in the various Acts of Parliament, the general provisions of which might seem to militate against the privilege.

With regard to the early cases which have been referred to, this observation occurs to me. In the case before Lord *Hardwicke, Meymot's Case* (1), His Lordship held that, at all events, a commission of bankruptcy might rightly issue against a person having privilege of Parliament, because although the privilege settled by the Common Law protected him against some of the consequences of bankruptcy (namely, the consequence of arrest), yet the other consequences would follow his property. It was not necessary that the act of bankruptcy should be occasioned by arrest; there were other acts of bankruptcy that might be committed by him, and a commission of bankruptcy might follow in respect of those other acts of bankruptcy, and when that commission issued his property would be subject to be dealt with according to the law of bankruptcy.

The Act of *George* III. to which we have been referred—one of the earliest Acts dealing with this subject—was an Act which contained a recital of a very marked character, drawing a distinction between that which was or was not possible with reference to persons having the privilege of Parliament, and that which was merely a subject of doubt, in consequence of cases that seem to have occurred shortly before the passing of the Act.

The recital of that Act, passed in 1764 (4 Geo. 3, c. 33), was in these words:—[His Lordship read it (2).]

The preamble, therefore, clearly distinguished between the two points which required to be dealt with. One point was this, that inasmuch as persons having privilege of Parliament could undoubtedly not be arrested, there did not exist the means of com-

(1) 1 Atk. 196, 201.

(2) See *ante*, p. 665.

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pelling them to become bankrupts; and the other point was, the question whether they were otherwise exempted from the operation of the laws of bankruptcy, for doubts had arisen as to whether or not the statutes of bankruptcy could be applied to them. I do not think that anything more was done by that statute than this, that the privilege was distinctly recognised with reference to arrest, and at the same time it was distinctly provided that the doubts as to liability to bankruptcy should be silenced by enacting that commissions of bankruptcy might, notwithstanding those doubts, be issued.

Subsequently to that, it appears that various Acts of Parliament, cited to us by Sir *Roundell Palmer*, and commented upon by Mr. *Reed*, dealing with the subject matter of debts, and making provision for their payment, have from time to time contained a reservation of the privilege of Parliament. So again the Bankruptcy Acts have from time to time done the same, even when bringing more and more within the consequences of bankruptcy persons having privilege of Parliament. Care has been taken to preserve that privilege. But it does not seem to me that on that account we are to say (for that would be too sweeping and dangerous) that in every case where a debtor is mentioned, and no saving is contained of the particular character which is here referred to, the debtor mentioned in the Act being subject to process of execution against the person, a debtor having privilege of Parliament may be included in the general provision. It seems to me that a more sound and reasonable interpretation of such an Act of Parliament would be, that the privilege which had been established by Common Law and recognised on many occasions by Act of Parliament, should be held to be a continuous privilege not abrogated or struck at unless by express words in the statute—and thereby the inconvenience would be avoided, which, in many cases, would be very great, of saying that by no possibility can you construe an Act dealing with a debtor in a way which might interfere with the protection of his person from arrest, so as to include under that Act any person having the privilege of Parliament.

Now, that proposition seems to me so wide, that without going through all the Acts of Parliament which have been enacted with respect to debtors, I shall not be able to do full justice to the

inconveniences that might arise; but I confess that I have the strongest possible impression of the mischief which would be introduced if such a conclusion were to be arrived at, and I should pause to make farther inquiry into it, if I did not think that upon the statute we are dealing with there can exist no reasonable doubt whatever. In the course of the ingenious argument we have heard at the Bar, I called Mr. *Reed's* attention to a case that might possibly occur under the Act of 1 & 2 Vict. c. 110, which deals with judgments against debtors. The Act gives very enlarged remedies against the real estate of judgment debtors, and still more enlarged remedies against their choses in action and chattels, with a clause (1) that any person taking a debtor in execution shall lose the benefit of these special provisions with respect to judgments. The argument might just as well be urged that as that Act speaks expressly of a debtor taken in execution, none of those remedial measures with reference to execution against the land or the chattels can possibly apply to a person having privilege of Parliament, because as it talks of the person being taken in execution, it must be inapplicable to a person having the privilege of not being liable to be personally taken in execution. If that was true it would follow that you could not avail yourself of these beneficial and remedial clauses against the land or chattels of a person having the privilege. Of course, that would be a curious extension of the argument that has been urged here, but still it is one that would very logically follow from the reasoning adopted in the present case.

Now what do we find in the present case? We find in the Act of Parliament of 1849, following a variety of other Acts, that provision is made with reference to persons having the privilege, who may become bankrupt. That Act of Parliament consolidated the previous Acts containing certain provisions with reference to traders having privilege of Parliament, and the 65th and 66th sections are important. The 65th section declares that all traders should be deemed liable to become bankrupt. And then the 66th section says, "That if any such trader having privilege of Parliament shall commit any act of bankruptcy he may be dealt with under this Act in like manner as any other trader, but such

(1) Sect. 16.

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person shall not be subject to be arrested or to be imprisoned during the time of such privilege, except in cases made felonies or misdemeanours by this Act."

It is not altogether useless, perhaps, to observe that the 65th section does not say whether it means persons having the privilege of Parliament or not, but it seems to assume that under the words "all traders," shall be included persons having the privilege of Parliament; and having assumed that, it proceeds, in the 66th section, to say what shall be done in the case of a trader having the privilege. The argument from this has been that the words "all traders" except for that clause, would not have involved any person having the privilege of Parliament; and that although the 66th clause proceeds on the assumption of there being traders having the privilege of Parliament, the 65th would not have included them had not the 66th clause been inserted.

Now let us see what is done under the Act of 1861. The 232nd section of that Act enacts that the two Acts "should be construed, together with so much of the *Bankrupt Consolidation Act*, 1849, as remains unrepealed, as one Act." Then the 69th section, the one upon which the argument here chiefly turns, says, as to the persons to be made subject to the Act, "all debtors whether traders or not shall be subject to the provisions of this Act." Nothing could be more extensive, nothing could at first sight appear to be more entirely in the mind of the Legislature than the purpose of including every man who had a debt, whatever his position might be; just as in the other statute it is said that "all traders" shall be liable to become bankrupt. Then it is said that in the event of their becoming bankrupts, certain particular traders should have a privilege which other traders should not have. Then the original Act having said "that all traders shall be deemed liable to become bankrupt," this Act says, "all debtors whether traders or not." I think the observation of Lord Justice *Giffard* is perfectly just, that the words "all debtors" included persons of every description. We cannot construe the words "all debtors" as making an exception from the class of debtors, so that those who really are debtors, but who have this particular privilege, shall not be liable to them. The 69th section expressly enacts that "all debtors whether traders or not" shall be subject to the same consequences as "all

traders" in the previous Act were subject to, which "traders" did include every class. To restrict its meaning would be contrary to all the principles of construction, and would lead to the necessary conclusion that in every instance where the word "debtor" is mentioned in any Act of Parliament whatsoever, you are to except this particular class of persons, unless you find this privilege specially referred to.

But the case does not rest even here. I should be quite satisfied, even if we had not the 66th section in the previous Act with reference to traders having certain immunities, to come to the conclusion that in law your Lordships would be justified in holding that the clause in that Act of Parliament dealing with all debtors includes all debtors whatever, whether having this privilege or not. This would not lead to the destruction of the privilege unless there was some special clause in the Act striking at and distinctly abolishing it; but as debtors they would be subject to all the consequences which as debtors they are liable to now. At this moment they would, as debtors, be liable to have their goods taken in execution, and to have their land taken in execution. They would be liable to every consequence to which they were originally liable as debtors. But it being one consequence of their position, not for their own personal benefit at all, but for the good of the state, and resting upon sound grounds of state policy, that they should have a privilege which is secured to them by the Common Law—I believe from the earliest times—that they should be personally free from arrest, that privilege would still follow them. It is not because, *ex majore cautelâ*, several Acts of Parliament have thought it necessary specially to reserve that privilege, that it is to be held to be abolished and annihilated in every other Act of Parliament in which it is not expressly reserved. I think that that is safe ground to rest the case upon, that it is consonant to the Acts of Parliament to say that debtors having the privilege of Parliament are included under the phrase of "all debtors;" but that the privilege is not gone because it is not specially struck at. It only amounts to saying, that they having the privilege at Common Law, and it being recognised by a number of Acts of Parliament, that privilege will not be annihilated because it is not specially dealt

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with in this Act of Parliament. Lord *Hardwicke* seems to have come to that conclusion in *Ex parte Meymot* (1), and I apprehend it is a sound and safe conclusion.

With reference to this particular Act and the special case before us, there is much to be said (if it were necessary) as to the reservation in the 69th section with regard to non-traders. A certain Act passed as to traders says that every trader in a certain special position shall be in future, as he was previously, free from arrest; but that privilege does not apply with regard to felony or misdemeanour, for the privilege of Parliament never extended to felony and misdemeanour at all. Now, reading the two Acts together, when the 69th section of the Act of 1861 says, "All debtors whether traders or not shall be subject to the provisions of this Act," I apprehend that it is a legitimate way of construing the Act (if it were necessary) to say, that this Act subjects all debtors, traders or non-traders, to the same consequences to which all traders were before subject; that we must then find to what things traders were subjected, and finding what these things were, we must apply them to this new class, non-traders, certain persons on account of their peculiar privilege being alone excepted. They are to be subjected to the liabilities of traders—they must continue to enjoy the privileges which traders of their class before enjoyed. That would be the rational and sound construction of the Act.

I do not feel myself in any way impeded by the decision of Lord *Cairns* from taking this view. I notice that decision for two reasons, first, because Sir *Roundell Palmer* said that he was surprised that Lord Justice *Giffard*, in giving judgment in this case, had not noticed it; and, secondly, because of the respect that I have for any decision whatever coming from Lord *Cairns*, by whom I should be glad to be instructed. I observe that he very carefully, as is consistent with his course in giving judgment in all cases, confined himself to the case that he had to determine; and at the outset of his judgment he expressly said (2), "In this case I do not mean to give any opinion as to the extent to which the 101st section of the Act of 1849 is incorporated into the Act of 1861,

(1) 1 Atk. 196, 201.

(2) *Ex parte Bristow*, Law Rep. 3 Ch. Ap. 247.

nor any opinion as to the incorporation, or the extent of the incorporation, of any other section of the Act of 1849 in which the word 'trader' occurs. I think it quite sufficient to confine the observations I am about to make to the precise case which is now before the Court."

Now, what was the precise case before the Court? It was one with respect to which there can be no doubt that the judgment was perfectly sound, and stood upon a basis which cannot be in any way shaken. The case was this:—With reference to traders a certain course of dealing was pointed out in the Act of 1849, which is incorporated with the Act of 1861, and a certain different course of dealing with regard to the very subject matter which was before His Lordship for judgment, was pointed out with reference to non-traders. As regarded traders, you might substitute any one creditor for another in the course of proceeding under the Bankruptcy Acts. So that, in the event of the death or removal of the creditor who had first taken proceedings to obtain adjudication, another might continue those proceedings. The reason was pointed out by Lord *Cairns*, namely, that it was utterly immaterial who the creditor was, as long as he was a creditor, because the proceeding was *ex parte*. Such notices as were to be given were specified, but they were of a character which made it entirely indifferent to the person against whom the adjudication was sought whether they were given by *A.* or *B.* Now Lord *Cairns* says, as to the non-traders, I find that a totally different course is prescribed. A non-trader may contest the right of a particular creditor to proceed against him, and the non-trader having that particular right it makes all the difference to him whether it is *A.* or *B.* who is pursuing him. He may have a case against *A.* which he has not against *B.*; and, therefore, in that case, it is by no means an indifferent matter whether a fresh creditor takes up the proceedings or not, for a fresh case is brought in, and a case which the debtor may fairly and distinctly dispute. In that state of things it is idle to ask me to read a clause which has reference to traders who are subject to one course of procedure as applying to the case of a non-trader who is subject to another course of procedure.

But it is very different when the matter is one of exemption from

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a particular consequence of a statute reserving an old and undoubted privilege; and then, on the introduction of non-traders, subjecting them to the serious consequences previously applicable to traders alone, and in that way to the consequences of the penal provisions of the Act. You find that the persons into whose class they are brought have exemption from the penal consequences of this Act, and so the question arises whether this new class thus found to be introduced into the case ought or ought not to have the same protection as the old class with regard to any penal consequences? It seems to me that this case may be rested upon the ground that all debtors are included in the Act, but that all such privileges are saved to them as ought to be saved under the Common Law to the former class of bankrupts, unless those privileges are specially struck at by Act of Parliament. I should be content to rest my view of this case upon that ground; but as regards the particular case before us, it might well be rested even upon the construction of the Act itself. And in both points of view I think the appeal must fail.

LORD WESTBURY:—

My Lords, let us first consider what is the *onus* that lies on the Appellant. The *onus* is this, that he must prove to your Lordships conclusively, that when we find in the Act of 1861 the positive enactment that "all debtors whether traders or not shall be subject to the provisions of this Act," these words "all debtors" do not include debtors having privilege of Parliament. The words are positive; they are without any exception expressed. He must shew, therefore, by argument as conclusive as the positive words of the enactment itself, that such an exception is necessarily implied.

Now, how does the Appellant propose to discharge himself of that obligation? He says, first, that it has always been a principle of the bankrupt law to make careful provision for the personal immunity of members of Parliament; and he refers to the 4 Geo. 3, and the statute of 1849, in illustration of the care that has been taken to provide for that personal immunity. He then goes on to assume as a fact that there is no such provision, express or implied, contained in the Act of 1861 as applicable to non-

traders being members of Parliament; and from the alleged or assumed absence of any such provision he draws the extraordinary conclusion that the Act of Parliament when it speaks of "all debtors" did not intend to include therein debtors, non-traders having privilege of Parliament.

Now, it is quite obvious that no such conclusion can be drawn from any such words. You may draw the conclusion if you please that provision for the exemption of non-traders being members of Parliament has been omitted by inadvertence, but it would be wild to come to the conclusion that because there was no such provision the positive words of the statute, used without qualification, must be read and considered and understood as being subject to a very great qualification.

Well, then he carries his argument a little farther; because he contends that, according to the principles of law, as recognised in the statute of the 4 Geo. 3, no commission of bankruptcy could be issued against a trader having privilege of Parliament without the express permission of the Legislature. That, again, is an assumption which appears utterly unwarranted—and the investigation of this matter, which has been made here and elsewhere, has conclusively shewn the accuracy of Lord *Hardwicke's* view on the matter. Lord *Hardwicke* laid down, in 1747, that if a peer or a member of the House of Commons is a trader, there is nothing to prevent his being adjudicated a bankrupt. He held also, with that peculiar soundness of view which characterised the mind of that great Judge, that it may follow that the personal privilege which is attached to a member of the Houses of the Legislature, not being taken away by enactment, may exempt the person, when adjudicated a bankrupt, from some of the personal liabilities which attach to an ordinary bankrupt. But he held, that although that personal exemption might remain that would be no reason why the individual should not be adjudicated a bankrupt. That appears probably to have been somewhat canvassed, or the inconvenience that was felt arising from the proposition of law was regarded as a thing that required to be remedied; because if you held a member of the Legislature to be subject to bankruptcy you were met by this difficulty, that unless he voluntarily committed an act of bankruptcy you never could enforce the law of bank-

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ruptcy against him. For at that time the only mode of compelling him to commit an act of bankruptcy was by throwing him into prison and keeping him there for a certain time, after the expiration of which period of imprisonment you were entitled to consider him as having committed an act of bankruptcy, and to issue a commission against him. But as you could not throw a member of the Legislature into prison there was no mode of compelling him to commit an act of bankruptcy. And, therefore, to promote Lord *Hardwicke's* view of the law, and not to question it, means were provided by the statute of 4 Geo. 3, to compel a member of the Legislature to commit an act of bankruptcy without the necessity of throwing him into prison. And the statute proceeds on that principle—not as recognising the impossibility of making a member of the Legislature a bankrupt, but as holding him liable to bankruptcy, and assisting the creditor to obtain the benefit of that process by furnishing him with the means for compelling the member of the Legislature to commit an act of bankruptcy. And therefore the statute, in the preamble, states distinctly that "inasmuch as members of the Legislature were not compellable to pay their just debts or to become bankrupt by reason of the freedom of their persons from arrest"—then it goes on (which was the main object of the enactment) to give a judgment creditor a right to a summons, and to provide that non-compliance with that summons should, in certain cases, be an act of bankruptcy by the peer or member of Parliament. It is quite clear that that never would have been done if it had not been considered that at that time they were liable to the bankrupt law although they could not be compelled to commit an act of bankruptcy.

But the rest of the statute, which was relied on in the argument, was this, that it having been recited in the preamble that doubts had arisen whether in cases of bankruptcy a commission of bankruptcy could be sued out during the continuance of the privilege of Parliament, then, to remove that doubt, and to remove it by what is declaratory of the law, and not by making a new law, it is provided that if a member of Parliament or a peer commits an act of bankruptcy, "any creditor or creditors may sue out a commission of bankruptcy against him, and the Commissioners in such commission, and other persons may proceed thereon in like manner

as against other bankrupts; any privilege of Parliament to the contrary notwithstanding."

Now that Act of 4 Geo. 3 has long since been swept away; but though it has been repealed, its effect as a declaration of the law must still be considered as operative; and therefore the Legislature, in the subsequent Acts of Parliament, has not deemed it necessary to follow its very words. And in the Act of 1849 nothing is said about permission to sue a fiat in bankruptcy; but what is said is limited to this, that if any such trader having privilege of Parliament shall commit an act of bankruptcy, he may be dealt with under this Act in like manner as any other trader. Therefore it is plain that the Act of Parliament treated him as liable to be adjudged a bankrupt, and treated him as liable to all the consequences, save only those that might affect the privilege of personal immunity.

Well, that was followed by the enactment of 1861; and the words there are not permissive merely, but they are compulsory; because it is said there that all debtors whether traders or not shall be subject to the provisions of the Act. And therefore we come back to the former proposition, that unless you can shew sufficient ground to exempt a peer or a member of Parliament, being a non-trader, from the operation of this enactment, this enactment gives the fullest possible power to bring them within the scope of the bankrupt law, and to make them liable to adjudication of bankruptcy, and to the consequences of adjudication. But I deny altogether an assumption that has been made, namely, that the privilege of the person will be lost in such a bankruptcy in the case of a non-trader, in consequence of there being no stipulation in the statute saving the privilege. I do not think that that would be the consequence at all—I think it would be left still, as Lord *Hardwicke* put it, that the privilege of Parliament would remain, and would override any enactments which, in the case of ordinary individuals, might infringe upon personal immunity. It would remain precisely as Lord *Hardwicke* treated it as remaining, antecedently to the statute of 4 Geo. 3. But it is unnecessary to discuss that, because we come to the question, What is the effect of the incorporation of the 69th section of the Act of 1849 into the statute of 1861. The whole of the Act of 1849 is,

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by the operation of the Act of 1861, incorporated into it, unless it is anything that is inconsistent with it, and is made part of it, and is to be read in connection with it. It is a much easier conclusion, much more natural, and much more conformable with law, to read the statute of 1849, when incorporated with the Act of 1861, as extending to the non-trader the privilege given to the trader, and to hold the words which subject non-traders to the provisions of this Act as equivalent to putting the non-trader, where the contrary is not to be derived from the context, in the same position as the trader previously stood. Your Lordships will find that throughout the whole Act of 1861, wherever the non-trader is intended to stand on a different basis or footing from that of the trader, words are expressly introduced to declare it. But there are some provisions taken from the Act of 1849 which were applicable, of course, only to traders, and which, by force of the incorporation of this Act into the Act of 1861, may well be held applicable to non-traders by virtue of the words that they shall be subject to the provisions of this Act—there being nothing in the Act of 1861 that renders the incorporation of the non-trader into the enactment inconsistent with the rest of the statute. There is nothing at all inconsistent in holding that a non-trader, if a peer of Parliament, shall be put in the same position in which a trader, being a peer of Parliament, formerly was; it would be for his benefit and not for his injury. There is nothing, therefore, inconsistent in holding the incorporation sufficient to give him the benefit of the privilege which had been previously given to the trading peer of Parliament in precisely the same manner as if the enactment had been re-enacted, and made applicable to the non-trading peer of Parliament. That is a much easier conclusion than to hold that by reason of the provision not being repeated and made applicable to the non-trading peer of Parliament, the non-trading peer of Parliament is to be exempted altogether from the operation of the statute. It is unnecessary determine this one way or the other, the *ratio decidendi* being, in my opinion, that the words "all debtors whether traders or not," comprehend the non-trading peer being a debtor as much as they comprehend the trading peer being a debtor; and that there is nothing in the suggestions which have been made to us that is of sufficient weight to compel us (for

we must be compelled) to limit the universality of the enactment, and to take a certain class of persons only, by inference or a supposed implication, out of the extended ambit or the universality of these words.

With reference to the decision of Lord *Cairns*, there can be no doubt about it, because it related to process. The process against a trader being, throughout the Act of 1861, a different one from the process against a non-trader—and there being that distinction in all the procedure as against the one class and the other carefully preserved by the Act of 1861—Lord *Cairns* refused to allow a mere directory provision, upon a matter of procedure contained in the Act of 1849, as to a trader, to be extended by implication to a non-trader under the Act of 1861; and most wisely and most rightly, because nothing can be more carefully distinguished in the Act of 1861 than what shall be the procedure against the one class and what shall be the procedure against the other.

I am very glad that we have had this matter so thoroughly investigated as it has been at the Bar, as we may feel every confidence that everything material for arriving at a right determination has been presented to us; but, notwithstanding all that has been urged, we can have no doubt as to the correctness of the decision from which this is an appeal.

LORD COLONSAY:—

In common with your Lordships I have listened with great interest to the argument which has been brought before us in this case. It appeared to me that everything that could possibly be said in support of the appeal was said, and with great clearness and force. The basis of the argument was this:—that prior to the year 1849 a person having the privilege of Parliament was not to be adjudged a bankrupt; and that in the year 1849 the law made a person, though having privilege of Parliament, if he was a trader, liable to be adjudged a bankrupt, but at the same time reserved to him, in express terms, that protection which has been alluded to in the course of the argument. Then came the Act of 1861, under which the present proceedings took place; and the argument was that that Act of 1861, though in words it extends to all debtors whether traders or not, does not comprehend a person

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having the privilege of Parliament who is a non-trader. That there is no reservation of his privilege, and you must hold either that he is excluded from the operation of the Act, or that there was no protection for him under the privilege of Parliament, the last being held to be the stronger proposition; and, therefore, to exclude the general scope which is proposed to be given to these words, "all debtors whether traders or not."

It appears to me that this is not a sound argument. In the first place, the Act of 1849 placed beyond all doubt this proposition, that a person having the privilege of Parliament may be adjudged a bankrupt, that is to say, that those provisions of the bankrupt law which apply to the distribution of property, and so forth, may be put into operation and carried through, consistently, however, with the reservation of the Parliamentary privilege—protection to the person of the bankrupt. Now, that being so, the question comes to be whether in the Act of 1861 the general words "all debtors whether traders or non-traders," are to be read as comprehending a person having the privilege of Parliament who is a non-trader, seeing that the Act of 1861 does not repeat the protection which is contained in the Act of 1849. I think that the Act of 1849 in as far as it contains that statement of protection contains what was not necessary. But, certainly, now that we have that Act, we have the protection applied to persons possessing that protection brought under the operation of the bankrupt law. I think that the sound construction is, that the Act of 1861 is to receive effect according to the plain meaning and interpretation of the words, "all debtors whether they are traders or non-traders;" and that they who have the privilege of Parliament do not lose it. They are placed in the same predicament with those persons who under the Act of 1849 are described as traders and have privilege of Parliament. Indeed, I think that was a protection which could not be lost without being expressly taken away. It is not inconsistent with an adjudication of bankruptcy that the persons had such protection as appears clearly by the Act of 1849. Therefore, I think that the judgment of the Court below was a right judgment.

THE LORD CHANCELLOR:—My Lords, I think the proper course

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will be to declare the opinion of your Lordships in answer to the question stated in the special case, namely, "Whether a peer of the realm, enjoying privilege of Parliament, and being a non-trader, is subject to an adjudication of bankruptcy under the *Bankruptcy Act*, 1861." I shall propose to your Lordships to answer that question in the affirmative, and that the appeal be dismissed, and that the costs of the petitioning creditor be paid out of the estate.

Appeal dismissed, the costs of the petitioning creditor to be paid out of the estate.

Lords' Journals, 7th July, 1870.

Solicitors for the Appellant: *Munns, Nunn, & Longden.*
Solicitors for the Respondent: *Lawrance, Plews, Boyer, & Baker.*

END OF VOL. IV.

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"ADJOINING OWNER": *See* RAILWAY.

Where, by agreement, a wall has been built on land dividing the property of an individual from that of the company, and the individual and the company are, by the same agreement, the joint owners of the land on which the wall is built, that circumstance does not affect the individual, so as to prevent him from being considered an "adjoining owner." LONDON AND SOUTH WESTERN RAILWAY COMPANY *v.* BLACKMORE - - - - - - 610

Where an adjoining owner claimed from a railway company a right of pre-emption of certain lands which the company was about to sell, such lands never having been his, nor severed from any part of his estate, the House, while affirming his right to make this claim, directed an inquiry whether there was any other adjoining owner who was equally entitled with himself to make such claim. *Id.*

ADMINISTRATION. By the law of *England*, if a married woman becomes entitled to the property of a deceased relative situated in *England*, and her husband takes no step to reduce her rights into possession, and she dies, and her husband does not take out administration to her, and he dies, the child of these married persons must take out two administrations, one to his father, the other to his mother, on each of which, as on a distinct devolution of property, duty is payable to the Crown. PARTINGTON *v.* THE ATTORNEY-GENERAL - - - - - - 100

If this child is domiciled in a foreign state, where his parents were also domiciled, and empowers a person in *England* to take out administration for him, the same course must, under the same circumstances, be pursued, even though the property, when obtained, is to be distributed in the foreign state, where the law might not require this double authority of administration. (*Diss.* Lord *Westbury.*) *Id.*

Where such property, no next of kin appearing, had been taken possession of by the Solicitor to the Treasury, who had paid off all the debts of the intestate, and then paid over the balance to the Crown, and, after some years, the claim of the next of kin was established, and the Solicitor of the Treasury ordered to pay over the principal amount, with interest, to the next of kin, the interest as well as the principal is chargeable with duty: the rule being that whatever is recoverable by virtue of the letters of administration is so chargeable, and the interest was so recoverable, being, in fact, part of the estate for which administration was granted.—Observations upon *Gutteridge* v. *Stilwell* (1 My. & K. 486), and *Loy* v. *Duckett* (1 Cr. & Ph. 305). PARTINGTON *v.* THE ATTORNEY-GENERAL - - 100

AGREEMENT: *See* COMPANY; PENALTY; RAILWAY. 4; ROYALTY; WAIVER.

The reservation of a right to have full payment of money actually due on an existing contract, should there be a failure to pay a smaller sum on a day certain, cannot be treated as a penalty.—Therefore, where a certain sum of money is due, and the creditor enters into an arrangement with his debtor to take a lesser sum provided that sum is secured in a certain way and paid at a certain day, but if any of the stipulations of the arrangement are not performed as agreed upon, the creditor is to be entitled to recover the whole of the original debt, such remitter to his original rights does not constitute a penalty, and Equity will not interfere to prevent its observance. THOMPSON *v.* HUDSON - - - - 1

ANCHORAGE AND PORT DUES: *See* PORT; SOUTHAMPTON DOCKS.

BANKRUPT: *See* PEERAGE; PRIVILEGE; STATUTE.

Where persons having, as a class, certain privileges, are by statute subjected to certain liabilities, their privileges being expressly reserved to them, and other persons having the same privileges are afterwards, as a class, subjected to the same liabilities, but nothing is said of their privileges, these privileges still continue to exist.—Privilege of Parliament exists at Common Law, and is not taken away by implication because a statute makes persons enjoying it subject to the law of bankruptcy, and does not specially reserve the privilege.—Before the *Bankruptcy Act* of 1861 traders having privilege of Parliament were rendered liable to the bankrupt laws, but the privilege of freedom from personal arrest was expressly reserved to them. By the 69th section of the Act of 1861 all debtors (non-traders as well as traders) were made liable to the bankrupt laws. Nothing was said in the Act to reserve to debtors who had privilege of Parliament their freedom from personal arrest:—*Held*, that the statute included all debtors whatever, but that such debtors as were entitled to privilege of Parliament still continued to enjoy its protection. NEWCASTLE (DUKE OF) *v.* MORRIS - 661

BILL OF EXCHANGE: *See* Foreign Court and Foreign Law.

BILL OF LADING: *See* Ship; Sufferance Wharf.

Where goods are at sea, the parting with the bill of lading, which is the symbol of the goods, is parting with the ownership of the goods themselves. Barber *v.* Meyerstein - - 317

The same principle applies to goods which, for the convenience of parties, have been landed at a sufferance wharf. (See 11 & 12 Vict. c. xviii.; and see also 25 & 26 Vict. c. 63, s. 67.) *Id.*

As long as the engagement of the shipowner has not been completely fulfilled, the bill of lading is a living instrument, and the transfer of it for value passes the absolute property in the goods. —It has not been fulfilled when the goods, though actually landed at a wharf, are subject to a stop order.—The person who first gets the bill of lading (though only one of a set of three) gets the property which it represents, he need not do any act to assert his title, which the transfer of the bill of lading of itself renders complete, and any subsequent dealings with the others of the set are subordinate to the rights passed by that one.—Though the shipowner or wharfinger, having no notice of the transfer of one bill of lading, may be excused for delivering the goods to a person who produces to him another bill of lading which has in reality been subsequently taken, that does not affect the legal ownership of the goods as between the holders of the two bills of lading.—The Acts relating to landing goods at a sufferance wharf were intended for the protection of the shipowner. *Id.*

CHARGES: *See* Railway. 1.

CIVIL SERVICE FUND: *See* Madras Civil Service Fund.

COMPANY: *See* Misrepresentation; Winding-up.

The directors of a banking company, in February, 1864, issued a report declaring a dividend of 15 per cent. upon the shares, and a bonus of 10 per cent., and a large addition to the reserve fund. In June, 1864, they offered to the shareholders the option of taking (according to the proportion of shares held by each shareholder), certain reserved shares at a premium. The executors of a person deceased accepted some of these reserved shares. The report of February, 1864, was, in fact, utterly erroneous, and in September the bank stopped payment. No evidence of wilfulness on the part of the directors in misrepresenting the affairs of the company was given:—*Held*, that there was not enough on this state of facts to constitute a misrepresentation which would avoid the acceptance of the shares, and so prevent the Appellants from being put, personally, upon the list of contributories.—In their circular the directors also asked whether, should there be any of the reserved shares remaining undisposed of, each shareholder would say if he wished to have any shares in addition to those he might receive as his proportional shares. They also required payment to be made on or before the 1st of October. The Appellants answered that they did wish to have some additional shares. In their reply, dated the 18th of July, the directors declared that additional shares had been allotted to them, and that payment thereon must be made on a day specified *or the shares would be forfeited.* No notice was taken of this communication:—*Held*, that there was no complete contract as to these additional shares. Jackson *v.* Turquand [305

COMPANIES ACT, 1862: *See* Winding-up.

COMPOSITION DEBT: *See* Agreement.

CONDITION.] Where an estate has been plainly given in a will, it is not, from the use of subsequent words, to be treated as given upon a condition, if those subsequent words are capable of being interpreted, not as a condition imposed, but as a mere description of the event on which the gift is to come into existence.—*W.* devised to his brother *C.* for life, and, in default of *C.* having issue living at the time of his death, to his next brother *F. B.* for life, and in default of *F. B.* having issue living at the time of his death, to his youngest brother *P.* in fee. The testator then described how *C.'s* children should take (namely, in tail male), and went on thus: "And in case *F. B. should come to the possession* of the said estate hereinbefore limited to him, and should die leaving issue, said issue to take in like manner" as before limited to the issue of *C.* *F. B.* died in the lifetime of *C.*, leaving a son. *C.* died some years afterwards without issue:—*Held*, that the words "should come to the possession" did not constitute a condition which, not having happened, prevented *F. B.'s* son from taking under the will, and so created an intestacy, but that he took under the force of the limitation created in favour of his father. Edgeworth *v.* Edgeworth - 35

CONTRACT: *See* Agreement; Company; Misrepresentation. 1.

1. Where a contract is voidable, but not void, it remains valid till it is rescinded. Reese River Silver Mining Company *v.* Smith - - 64

2. —— In a circular in June the directors of a company asked whether, should there be any reserved shares remaining undisposed of, each shareholder would say if he wished to have any shares in addition to those he might receive as his proportional shares. They also required payment to be made on or before the 1st of October. The Appellants answered that they did wish to have some additional shares. In their reply, dated the 18th of July, the directors declared that additional shares had been allotted to them, and that payment thereon must be made on a day specified *or the shares would be forfeited.* No notice was taken of this communication:—*Held*, that there was no complete contract as to these additional shares Jackson *v.* Turquand - - - 305

CONTRIBUTORIES: *See* Misrepresentation; Winding-up.

COSTS: *See* Railway. 3; Will. 4.

1. In an administration suit where the testator had himself occasioned the difficulty, the costs were ordered to come out of the fund. Maxwell *v.* Maxwell - - - - - 506

2. —— Where a decree of the Court below, though affirmed generally, was in some particulars varied, no costs of the appeal were given. London and South Western Railway Company *v.* Blackmore - - - - - - 610

CROWN: *See* Peerage; Port.

The Crown cannot give to the grant of a dignity or honour a quality of descent unknown to the law. The Wiltes Claim of Peerage [126

DEBT: *See* Will. 4.

DIRECTORS: *See* Company; Misrepresentation; Winding-up.

DISCRETION: *See* Trust.

DISTRIBUTION OF FUND: *See* "Eldest Son."

DOMICIL.] By the law of *England*, if a married woman becomes entitled to the property of a deceased relative situated in *England*, and her husband takes no step to reduce her rights into possession, and she dies, and her husband does not take out administration to her and he dies, the child of these married persons must take out two administrations, one to his father, the other to his mother, on each of which, as on a distinct devolution of property, duty is payable to the Crown.—If this child is domiciled in a foreign state, where his parents were also domiciled, and empowers a person in *England* to take out administration for him, the same course must, under the same circumstances, be pursued, even though the property, when obtained, is to be distributed in the foreign state, where the law might not require this double authority of administration. (*Diss.* Lord *Westbury.*) Partington *v.* The Attorney-General - - - - 100

DUES, COMPENSATION FOR: *See* Port; Southampton Docks.

DUPLICATE BILLS OF LADING: *See* Bill of Lading.

DUTIES: *See* Administration; Interest on Money due.

EAST INDIA DIRECTORS: *See* Madras Civil Service Fund.

"ELDEST SON" WHEN ASCERTAINED.] In a settlement where there is a clause excluding the eldest son from the benefit of a fund provided for children other than an eldest son, the time for ascertaining who fills the character of eldest son is the period fixed by the settlement for the distribution of the fund.—In such a case "eldest" is not solely senior in age, for (as stated by Lord *Hardwicke* in *Duke* v. *Doidge* (2 Ves. Sen. 203, n.), "Eldership not carrying the estate along with it is not such an eldership as will exclude."—*A.* was, under a will, tenant for life of an estate, remainder to his first and other sons in tail. On *A.'s* marriage a settlement was executed by which a fund was created and vested in trustees for the husband and wife for life, and after the decease of the survivor for the benefit of the children of the marriage, "other than and except an eldest son entitled under the will to an estate in tail male in possession, or remainder immediately expectant on the death of *A.*" There was a power of appointment in this husband and wife, and in the survivor of them. There were three children of the marriage—a son and two daughters. No joint appointment was made. The wife died. The son, on attaining twenty-one, joined with his father in barring the entail and resettling the estate, which was settled on the father for life, on the son for life, and on the sons of the son in tail.

"ELDEST SON," WHEN ASCERTAINED—*contd.*

The father appointed one moiety of the trust fund to a daughter on her marriage. No appointment was made of the other moiety. On the death of the father the son claimed a share of the trust fund:—*Held*, that though the character of eldest son was to be ascertained at the time of distribution of the fund, the son here was to be treated as the "eldest son entitled under the will," and consequently was not entitled to a share of the trust fund, for that his resettlement of the estate, and his taking under such resettlement an estate different from that given by the will, had in no way affected the character of "eldest son entitled under the will" which belonged to him when he came of age. Collingwood *v.* Stanhope - 43

EQUALITY CLAUSES.]—An absolute power in an Act of Parliament to fix charges for railway carriage is not rendered conditional by a subsequent clause requiring that all the charges made shall be made equally on like goods carried under like circumstances for all persons. The condition only attaches after the power has been exercised.—A charge of so much per ton, and 50 per cent. in addition, is a tonnage charge, and therefore precisely within the words of the 50th section of the 7 & 8 Vict. c. iii.—The words "goods of a like description and quantity" and "conveyed along the railway under the like circumstances" in the 7 & 8 Vict. c. iii., and "goods of the same description" and "under the same circumstances," in the *Railways Clauses Act*, are used not with reference to the contents of the parcels, but to the parcels themselves, that is, like or different for the purposes of carriage—and these words are used with reference to the conveyance of goods and not to the persons who send them. Great Western Railway Company *v.* Sutton - - - 226

EVIDENCE: *See* Railway; Reasonable and Probable Cause.

The agent and the traffic manager of a railway company had been present as parties at a reference relating to the railway where facts of a certain sort were proved in their hearing:—*Held*, that evidence of their having been so present was properly admissible as part of the proof that the company was informed and knew of the habits and practices of the mercantile houses, and knowingly charged the Plaintiff a higher rate than was demanded of other persons for the carriage of like packed parcels of goods carried under the like circumstances. Great Western Railway Company *v.* Sutton - - - - - 226

EXCESS: *See* Money had and received.

EXECUTOR: *See* Trust.

EXECUTORY TRUST: *See* Will. 5.

The general intent of a testator in creating an executory trust for a settlement of his property, not any strictly technical meaning attached to the words he has used, is to govern the preparation of the settlement. The manner of executing an executory trust must be guided by the object of the author of the trust, provided such object is one which can be legally effectuated. There is no difference between the construction to be put on an executory trust created by marriage articles and on an executory trust created by a will, except so far as the former, by its very nature, furnishes

EXECUTORY TRUST—*continued.*
more emphatically the means of ascertaining the intention of those who created the trust. West *v.* Holmesdale - - - - 543

FOREIGN COURT AND FOREIGN LAW.] Where a foreign Court, having competent jurisdiction in the matter, and honestly exercising it, delivers, in a proceeding *in rem*, a judgment, by which the sale of a chattel (a British ship then lying in the foreign port) is ordered, the sale cannot afterwards be impeached in this country in an action against the vendee, even though the person seeking to impeach it would, by the law of this country, have a preferential title to the chattel here.—A ship was, while in a port of an English colony, repaired and furnished with necessaries for the voyage. The captain drew on his owner for the amount due. The bill was never accepted. The ship sailed on its prescribed voyage, and before reaching *England* entered a French port. The bill was indorsed to a French subject, who sued the captain on it, and obtained in the *Tribunal de Commerce* a judgment against him, but the judgment freed him from personal arrest and declared the debt "privileged on the ship" (having priority over others). The ship was taken possession of by the French authorities under this judgment. While the ship was on its voyage, and before its arrival in the French port, the owner had executed a mortgage of the ship to a creditor. Neither the original owner nor the mortgagee was in any way personally cited in the action. The ship could not be actually sold till the Civil Tribunal of the district had confirmed the original judgment. It was confirmed, after the original owner and his assignee (for he had in the meantime become bankrupt) had been cited before the Civil Tribunal, and that Court disregarded the opinion of an English lawyer as to what would be the relative rights of the holder of a bill of exchange and the holder of a bill of sale of the ship. The assignee of the mortgage afterwards instituted before the Civil Tribunal a process in the nature of a replevy of the ship, but failed in the process, and the ship was sold:—*Held*, that there had been a judgment *in rem* in the French Court, and that the title of the vendee of the ship (an Englishman), could not afterwards be disturbed in this country.—*Per* Lord *Chelmsford*:—A proceeding in a foreign Court to enforce a maritime lien, which by the law of that foreign country and of all foreign codes founded on the civil law, though not so recognised by the law of this country, is a proceeding *in rem*, must be so treated here. Castrique *v.* Imrie 414

FORFEIT: *See* Contract.

FRAUDULENT CONVEYANCE: *See* Life Estate; Mortgage.

FREIGHT: *See* Bill of Lading.

HEADINGS OF CLAUSES: *See* Railway. 2.

HEARSAY EVIDENCE: *See* Reasonable and Probable Cause.

HEIRS: *See* Peerage.

INCLOSURE ACTS—MINES.] Under the *General Inclosure Act* (41 Geo. 3, c. 109, s. 32), lands of a manor sold to a purchaser for the purpose of

INCLOSURE ACTS—MINES—*continued.*
defraying the expenses of the Act would be discharged from all common and other rights thereon and therein, and would be vested in him in fee simple, and held in severalty by him as his private and absolute property. The 44th section, however, provides that the general Act should be binding only so far as should not be otherwise provided in any special Act.—A special Inclosure Act (1 & 2 Geo. 4, c. x.) recited the general Statute, and incorporated such of the provisions of the Statute as were not repugnant to, or controlled by, the clauses of the special Act, and then contained a clause reserving to the lord of the manor, &c., "according to their respective estates and interests therein, all mines, beds, seams, and veins of coal, lead, copper, tin, and iron, and other mines and minerals whatsoever, and all quarries of stone, slate, and flags, and all quarries whatsoever, found, or hereafter to be found, upon, with, or under the said lands or grounds hereby directed to be divided and inclosed, or any part or parts thereof," with full power to enter on the said lands or any part thereof, except certain specified parts (of which the subject matter of this suit was not one), "to search, bore, and dig for coal, &c., and all other minerals, &c., and to sink shafts and open veins in or upon the said lands or any part thereof, and to land such coal, &c., and lay and deposit the same on the said lands," and to continue the same there, and to take away the same in any manner whatever, "through or over the said lands, or any other of the customary lands within or holden of the said manor," and for that purpose to open gaps in the fences, and to make roads when and so often as he might think proper, and to "sink and drive such and so many pits, quarries, levels, soughs, saflights, tunnels, saights, and other necessary works within or upon the said lands," as he might think proper for getting the minerals, and to set up houses for workmen and buildings for smelting, &c., "in as full and ample a manner to all intents and purposes as could have been done if the said lands had remained open and uninclosed, or this Act had not been passed, &c., yet, nevertheless, making reasonable compensation for damages done by such works as aforesaid to the persons sustaining such damage":—*Held*, that, under the words of the special Act, the lord of the manor was entitled to the mines under the lands sold to pay the expenses of the Act, and was also entitled to work such mines to an extent which might reach to the utter destruction of the land above, subject only to the liability to pay compensation for damage done. The Duke of Buccleuch *v.* Wakefield - - - - - - 377

In a suit in which the Plaintiff claimed to be the absolute owner of certain land purchased under the provisions of this special Act passed to inclose the lands of the manor, the Court below made a decree declaring that he was only the owner of the surface of the land, but that, by the provisions of the Act, the Defendant continued the owner of the mines underneath the surface; and at the same time granted an injunction to restrain the Defendant from working the mines under the Plaintiff's land. On appeal, this House affirmed the first part of the decree, but reversed that part which granted the injunction; and as this amounted to a declaration that the Plaintiff

INCLOSURE ACTS—MINES—*continued.*

was wrong upon both points, the House ordered his bill to be dismissed. The Duke of Buccleuch *v.* Wakefield - - - - - 377

"INCOME" AND "INTEREST."] Where Commissioners are, by an Act of Parliament, authorized to receive certain money, and at the same time directed to pay a portion of those moneys to another body of persons, the gross sum received is to be deemed the "income" of the Commissioners, and the persons to whom the payment is to be made have an "interest" in that portion, and are entitled to enforce payment thereof. The Queen *v.* The Commissioners of Southampton Docks - - - - - - 449

INCORPORATION OF ACTS: *See* Inclosure Acts.

"IN REM": *See* Foreign Court and Foreign Law.

INTEREST ON MONEY DUE.] Where an intestate's property, no next of kin appearing, had been taken possession of by the Solicitor to the Treasury, who had paid off all the debts of the intestate, and then paid over the balance to the Crown, and, after some years the claim of the next of kin was established, and the Solicitor of the Treasury ordered to pay over the principal amount, with interest, to the next of kin, the interest as well as the principal is chargeable with duty: the rule being that whatever is recoverable by virtue of the letters of administration is so chargeable, and the interest was so recoverable, being, in fact, part of the estate for which administration was granted.—Observations upon *Gutteridge* v. *Stilwell* (1 My. & K. 486), and *Loy* v. *Duckett* (1 Cr. & Ph. 305). Partington *v.* The Attorney-General - 100

INTESTATE'S ESTATE: *See* Administration; Interest.

INTRUSION: *See* Royal Palace.

JUDGMENT IN REM: *See* Foreign Court.

LAND: *See* Railway. 2.

LIFE ESTATE: *See* Railway. 4; Will. 5.

1. Two judgments (one for £1000, the other for £2000) were entered up against *A.* in 1802. They constituted the amounts which *A.* had undertaken to pay his two sisters on their marriages. *A.* married. A few years after his marriage, namely, in 1809, *A.* made a voluntary settlement of his estate (of which he was then the owner in fee), in which settlement there was a recital that *A.'s* estate was subject to incumbrances amounting to £3000, in respect of money settled on his sisters, and to a charge in favour of *A.'s* wife; it then gave the estate to *A.* and his wife for their joint and several lives, and after the death of the survivor to the use of trustees for 300 years, to secure portions for younger children, and, subject to the term, to the use of *A.'s* then eldest born son for life, remainder to his first and other sons in tail male, with a power to the son, when he should come into possession of the life estate, to provide for wife and children. By deeds dated in 1818 and 1819, *A.* executed mortgages on this estate to two different persons. In 1831, by articles of agreement on the marriage of *A.'s* eldest son, the post-nuptial settlement of 1809 was recited; then the mortgages of

LIFE ESTATE—*continued.*

1818 and 1819 (the sum secured by that of 1818 was to form the portion of the son's intended wife), and certain provisions were made for the son's wife, and for the children of the intended marriage. During the life of *A.* some of these liabilities were (as it was alleged, and assumed to be proved) paid off out of his life estate; a part of the inheritance also was sold, and applied for a similar purpose. In 1861 he died, and certain persons who had, after the date of this settlement, obtained judgments against him, took proceedings in Chancery to have it declared that the principal of the judgments of 1802, and the mortgages of 1818 and 1819, were incumbrances affecting the inheritance, and ought to be paid out of the inheritance in exoneration of the life estate of *A.*:—*Held*, in the Court below, that assuming the fact that some of these charges had been paid out of the life estate of *A.*, the life estate was, in favour of creditors, entitled to stand credited as against the inheritance for so much of the principal of the judgment of 1802 (the judgment for £2000), as had been paid out of the rents and profits; but accounts were directed as to some charges affecting the life estate alleged to have been satisfied, during *A.'s* life, by the sale of part of the inheritance. This holding was affirmed on appeal. Dolphin *v.* Aylward - - - - - 486

The doctrine of marshalling declared not to apply to a case like the present. *Id.*

2. —— Where a codicil to a will clearly indicated the intention of a testator to annex estates and moveables to a peerage, to correspond as nearly as might be with the limitations in the patent, though the words creating the trust, and directing what should be done by the trustees, appeared to require that an estate tail should be given to the first holder of the peerage, those words were held to be explained and overruled by the expression of the general intent, and a life estate alone was given to him.—But to this life estate were appended (in order to satisfy the general intent of the testator) the conditions that the tenant for life should be without impeachment for waste, and that he might, to the extent specified in a will which the codicils recited (but for certain purposes revoked), charge the property with a jointure for his wife, and provide portions for younger children. West *v.* Holmesdale - 543

"LIKE DESCRIPTION": *See* Equality Clauses.

MADRAS CIVIL SERVICE FUND.] A fund was created at *Madras* (originally by agreement among members of the Civil Service there) to accelerate retirements from active service by the grant of pensions to officials so retiring. The Directors of the *East India Company* joined in the scheme, and undertook to provide one-half of the principal of the fund which was to supply the annuity. The subscriber was to supply the other half by paying a certain percentage on his salary during each year that he continued in the service. He might so continue a greater number of years than was necessary to make his payments equal to the one-half of the principal money. There was a resolution inserted in the rules of the subscribers (Rule 16) to the effect, that if the contributions of any subscriber should be in excess of the half-value, such

MADRAS CIVIL SERVICE FUND—*continued.*

excess should be refunded. The Directors of the Company always objected to this rule, but allowed it to be acted on for some years, until at length they declared in a dispatch that "the practice of refund hitherto allowed *should be abrogated*," and a special general meeting of the subscribers was called to consider this matter, the circular calling such meeting declaring that "It will be observed that the Honourable Court" [of Directors] "has *ordered* that the practice of refunding the excess be discontinued." A large majority declared in favour of accepting the revised rules as prepared by the Directors, from which the words of the 16th rule as to refunding were omitted:—*Held* (*diss.* Lord *Hatherley*, Lord Chancellor), that this act of the majority, even under the circumstances under which it took place, was binding on the whole body, and that no excess created by payments made after that date could be made the subject of a refund. The Secretary of State for India *v.* Underwood - - - - - 580

MANDAMUS: *See* Southampton Docks.

A direction in a mandamus to take measures for "obtaining and recovering payment" does not necessarily mean to bring an action, and such a direction, therefore, though not accompanied by a tender of indemnity, does not make the mandamus invalid. The Queen *v.* The Commissioners of Southampton Docks - - - - 449

MARITIME LIEN: *See* Foreign Court.

MARRIAGE ARTICLES: *See* Executory Trust.

MARRIED WOMAN: *See* Administration.

MARSHALLING ASSETS: *See* Life Estate; Mortgage.

MINES: *See* Inclosure Acts; Royalty.

MISDIRECTION: *See* Reasonable and Probable Cause.

MISREPRESENTATION: *See* Winding-up.

1. *Per* Lord *Cairns*:—If persons make assertions of facts as to which they are ignorant whether such assertions are true or untrue, they become, in a civil point of view, as responsible as if they had asserted that which they knew to be untrue. Reese River Mining Company *v.* Smith 64

A. read a prospectus issued by certain persons, the directors of a company, who proposed to carry on the business of mining, and getting and crushing minerals in connection therewith, and on the faith of the representation (among others of a similar nature) there made, that a valuable mine in *America* had been contracted for, the claims in which were described as very profitable, wrote to apply for shares. It turned out that the mine contracted for was valueless. On the 30th of December, 1865, this fact (without the particulars) was communicated to him in a circular sent out by the directors. On the 19th of January, 1866, a second circular explained the particulars, and announced that another and a really valuable mine had been purchased by the agents sent to *America* by the directors. On the 6th of February, *A.* filed his bill to be relieved from his shares, to be repaid the money he had already paid on their allotment, and to restrain the directors from suing him for calls. On the 20th of April an injunction to restrain was granted. On the 27th, a Petition was presented for an order to wind up the company. On the 28th of May, a winding-up order was granted; *A.'s* name was placed on the list of contributories. On the 10th of July, *A.* took out a summons to have his name removed from such list; but his application was, on the 13th of July, refused by the Master of the Rolls. The Lords Justices, on appeal, ordered *A.'s* name to be removed from the list, and this House affirmed that Order. Reese River Mining Company *v.* Smith - - - - - - 64

2. —— The directors of a banking company, in February, 1864, issued a report declaring a dividend of 15 per cent. upon the shares, and a bonus of 10 per cent, and a large addition to the reserve fund. In June, 1864, they offered to the shareholders the option of taking (according to the proportion of shares held by each shareholder), certain reserved shares at a premium. The executors of a person deceased accepted some of these reserved shares. The report of February, 1864, was, in fact, utterly erroneous, and in September the bank stopped payment. No evidence of wilfulness on the part of the directors in misrepresenting the affairs of the company was given:—*Held*, that there was not enough on this state of facts to constitute a misrepresentation which would avoid the acceptance of the shares, and so prevent the Appellants from being put, personally, upon the list of contributories. Jackson *v.* Turquand - - - - - - 305

MONEY HAD AND RECEIVED.] Money paid in excess in violation of the equality clauses of Railway Acts, can be recovered back in an action for money had and received. Great Western Railway Company *v.* Sutton - - - - 226

MORTGAGE AND MORTGAGEE — WAIVER.] The statute 27 Eliz c. 4, against fraudulent conveyances, enables a settlor to defeat a settlement which he has created on behalf of his family, but it only does so upon a subsequent conveyance to a purchaser for actual value. A mortgagee is a purchaser within the meaning of the statute. Dolphin *v.* Aylward - - - 486

MUNICIPAL CORPORATION ACT: *See* Southampton Docks.

ORIGINAL DEBT: *See* Agreement.

PEERAGE.

1. The decision of the Committee for Privileges as to the advice it shall give Her Majesty upon one particular claim of peerage, does not resemble the decision of the House sitting as the tribunal of ultimate appeal upon a question of law in a suit between two adverse parties; it is in no sense a judgment, and cannot, therefore, be treated as a binding authority in another claim of peerage, even though the terms of the patents in the two cases may be like each other. Wiltes Claim of Peerage - - - - 126

The Crown cannot give to the grant of a dignity or honour a quality of descent unknown to the law. *Id.*

A limitation to heirs in the grant of a peerage may be incapable of taking effect, and yet the patent, so far as the grantee himself is concerned, may not be void.—In the reign of *Richard* II. an Earldom

PEERAGE—*continued.*

was created *habendum, &c.*, "*A. et haeredibus suis masculis imperpetuum.*" The grantee sat in Parliament as Earl under this creation:—*Held*, that it did not create a dignity descendible to his heirs male general. WILTES CLAIM OF PEERAGE 126

The Earl was beheaded by *Henry of Lancaster* when he invaded *England*, and before he had received or even claimed the Crown. There was no evidence whether there had been any trial, or form of trial, before the beheading. When *Henry* was declared King, a proceeding took place in Parliament in which the Commons were represented to have prayed that all that was done in "the pursuit, arrest, and judgment" of the Earl might be declared good for the common profit of the realm. The King, with the assent of the Lords Temporal, declared that it was so. This proceeding was entered on the *Placita Coronæ* in Parliament, but not on the Rolls of Parliament. —*Semble*, that this was not an Act of Parliament; —But—it was a solemn adjudication pronounced by the King in open Parliament at the prayer of the Commons, and with the advice of the Lords, and must be taken as a Parliamentary declaration that, whatever had been the nature of the grant to the Earl, it was wholly at an end. *Id.*

2. —— A testatrix gave to the second son of an existing Earl (who had just been called to the House of Lords in virtue of a newly-created barony) certain estates. In default of issue of this second son the patent of creation contained a shifting clause by which, in certain events, the barony was to go over. The will, which was made immediately after this creation of the barony, and apparently in consequence of it, required the trustees to settle the estates given "in a course of settlement to correspond as far as may be practicable with the limitations of the barony." —*Quære*, whether the shifting clause in the patent creating the barony was valid, but the settlement was directed to be made in accordance with it. WEST *v.* HOLMESDALE - - 543

PENALTY.] *H.* was indebted to *T.* and *S.* in three different sums of money, which were the subjects of suits in Chancery. In the first and third of these suits the sums had been ascertained, but no final decree had been made respecting them. In the second suit there had been a final decree. *H.* wished for time and facilities to be afforded him for payment of these debts. *T.* and *S.* consented, and deeds were executed by which it was arranged that *H.* should admit the amount of the debts claimed in the first and third suits, and should not use his power to appeal against the decree in the second suit, that he should give a first mortgage on his real estate as a security, and that he should pay certain amounts on certain days. On these conditions *T.* and *S.* were to accept smaller sums in satisfaction. The deeds contained provisoes which (in different forms of language) expressly reserved to *T.* and *S.* the right, if any of the stipulations in the deeds were violated, to enforce payment of the original amounts found and admitted to be due:—*Held*, that this reservation of the right to enforce existing debts on non-payment of the smaller and covenanted amounts, was not a penalty against which Equity would grant relief. THOMPSON *v.* HUDSON - - - 1

PORT.] However commodious a place may be for the shelter of vessels, it will not therefore be a port, the establishment of which must be by authority of the Crown.—But, if so established, then, whether naturally or artificially formed so as to shelter vessels, a consideration for anchor dues arises. FOREMAN *v.* THE FREE FISHERS OF WHITSTABLE - - - - - 266

Where it had been found on inquisition in the reign of *Edward* I. that a grantee of the Crown had had "from time whereof memory is not, &c., wreck of the sea and toll with merchandize in the manor," and in the reign of *Edward* II. proclamations had been made to seize, in certain places (of which this manor was named as one), "where ships ply by the coast," &c., letters coming from abroad—and in the reign of *Elizabeth* a return to a Royal Commission mentioned the manor as a creek of one of the *Cinque Ports*, and many documents, some of them grants from the Crown, and others deeds under which the manor had from time to time been enjoyed, spoke of "tolls," and deputations had been issued by the owners of the manor to collect the tolls of all vessels anchoring there, and tolls had been so collected beyond the time of living memory, and a private Act of Parliament had adopted these expressions in authorizing the conveyance of the manor to a company thereby incorporated:—*Held*, that there was enough to justify the inference that a port did exist, and that a toll claimed, as a port or anchorage toll, had a legal origin. *Id.*

POWER: *See* EQUALITY CLAUSES.

PRACTICE: *See* WINDING-UP.

1. The decision of the Committee for Privileges as to the advice it shall give Her Majesty upon one particular claim of peerage, does not resemble the decision of the House sitting as the tribunal of ultimate appeal upon a question of law in a suit between two adverse parties; it is in no sense a judgment, and cannot, therefore, be treated as a binding authority in another claim of peerage, even though the terms of the patents in the two cases may be like each other. THE WILTES CLAIM OF PEERAGE - - - - - 126

2. —— Where two cases strongly resemble each other in point of fact, but the allegations of fact are not the same in each, the record in one cannot be referred to for the purpose of explaining or supplying anything doubtful in the other. GANN *v.* JOHNSON - - - - 265

3. —— In a suit in which the Plaintiff claimed to be the absolute owner of certain land purchased under the provisions of a special inclosure Act passed to inclose the lands of a manor, the Court below made a decree declaring that he was only the owner of the surface of the land, but that, by the provisions of the Act, the Defendant continued the owner of the mines underneath the surface; and at the same time granted an injunction to restrain the Defendant from working the mines under the Plaintiff's land. On appeal, this House affirmed the first part of the decree, but reversed that part which granted the injunction; and as this amounted to a declaration that the Plaintiff was wrong upon both points, the House ordered his bill to be dismissed. THE DUKE OF BUCCLEUCH *v.* WAKEFIELD - - - 377

PRACTICE—*continued.*

4 —— A Court of Equity will not interfere actively against a volunteer through the medium of a person (not a purchaser for value) claiming only through him who has created the voluntary settlement. Dolphin *v.* Aylward - - 486

PREVIOUS DECISION. *See* Peerage.

PRIVILEGE OF PARLIAMENT.] Where persons having, as a class, certain privileges, are by statute subjected to certain liabilities, their privileges being expressly reserved to them, and other persons having the same privileges are afterwards, as a class, subjected to the same liabilities, but nothing is said of their privileges, these privileges still continue to exist. Privilege of Parliament exists at Common Law, and is not taken away by implication because a statute makes persons enjoying it subject to the law of bankruptcy, and does not specially reserve the privilege.—Before the *Bankruptcy Act* of 1861 traders having privilege of Parliament were rendered liable to the bankrupt laws, but the privilege of freedom from personal arrest was expressly reserved to them. By the 69th section of the Act of 1861 all debtors (non-traders as well as traders) were made liable to the bankrupt laws. Nothing was said in the Act to reserve to debtors who had privilege of Parliament their freedom from personal arrest:—*Held*, that the statute included all debtors whatever, but that such debtors as were entitled to privilege of Parliament still continued to enjoy its protection. Newcastle (Duke of) *v.* Morris - - 661

RAILWAY.

1. An absolute power in an Act of Parliament to fix charges for railway carriage is not rendered conditional by a subsequent clause requiring that all the charges made shall be made equally on like goods carried under like circumstances for all persons. The condition only attaches after the power has been exercised. A charge of so much per ton, and 50 per cent. in addition, is a tonnage charge, and therefore precisely within the words of the 50th section of the 7 & 8 Vict. c. iii.—The words "goods of a like description and quantity" and "conveyed along the railway under the like circumstances" in the 7 & 8 Vict. c. iii., and "goods of the same description" and "under the same circumstances," in the *Railways Clauses Act*, are used not with reference to the contents of the parcels, but to the parcels themselves, that is, like or different for the purposes of carriage—and these words are used with reference to the conveyance of goods, and not to the persons who send them.—In an action for money had and received to recover back charges alleged to have been improperly made on the Plaintiff, evidence was tendered at the trial, and received, to shew that mercantile houses were in the habit of dispatching to the railway packed parcels, that is, parcels containing numbers of different parcels of different kinds of goods, and sent from and to different persons; that these packed parcels were so packed by these mercantile houses for the accommodation of their own customers and friends, and that these facts were well known in the trade, and (inferentially) to the railway company, but that a lower charge was made for them than for parcels packed in the same manner by the Plaintiff, who was a carrier,

RAILWAY—*continued.*

and who collected and packed parcels of the same sort in the way of his business. On exception that this evidence was insufficient without affirmatively shewing that, as a fact, the Defendants knew that these mercantile houses did so pack the parcels, and, so knowing, made a difference in the charge, it was held in the Court below and affirmed in this House, that the evidence was admissible, and warranted the Judge in telling the jurors that "there was evidence that parcels were carried by the Defendants for other persons containing goods of a like description, and under like circumstances, at a rate less than such goods were carried by them for the Plaintiffs."—The agent and the traffic manager of the Defendants had been present as parties at a reference where facts of this sort were proved in their hearing:—*Held*, that evidence of their having been so present was properly admissible as part of the proof that the Defendants were informed and knew of the habits and practices of the mercantile houses, and knowingly charged the Plaintiff a higher rate than was demanded of other persons for the carriage of like packed parcels of goods carried under the like circumstances.—Money paid in excess, under the above circumstances, can be recovered back in an action for money had and received. Great Western Railway Company *v.* Sutton - 226

2. —— The *Lands Clauses Consolidation Act*, and the *Railways Clauses Consolidation Act*, do not contain any provisions under which a person, whose land has not been taken for the purposes of a railway, can recover statutory compensation from the railway company in respect of damage or annoyance arising from vibration occasioned (without negligence) by the passing of trains, after the railway is brought into use, even though the value of the property has been actually depreciated thereby. (*Diss.* Lord *Cairns.*) Hammersmith, &c., Railway Company *v.* Brand - 171

The right of action for such damage is taken away. *Id.*

Rex v. *Pease* (4 B. & Ad. 30), and *Vaughan* v. *The Taff Vale Railway Company* (5 H. & N. 679), approved.—The headings of different portions of a statute are to be referred to, to determine the sense of any doubtful expression in a section ranged under any particular heading (See *Eastern Counties Railway Company* v. *Marriage*, 9 H. L. C. 32). (*Dub.* Lord *Cairns.*) *Id.*

3 —— Lands acquired by a railway company for the purposes of the railway, but not so employed, and merely capable of being afterwards used for building purposes, are not, on account of such capacity alone, to be treated as building land, or "lands used for building purposes," within the exception contained in that section.—Where a company having purchased land for the purposes of its railway, after using some of the land, sells the rest, calling it in the advertisement and particulars "surplus land;" this form of sale must be deemed a declaration that the land sold is "superfluous land" within the meaning of 8 & 9 Vict. c. 18, s. 127.—Though the directors of a railway company are not compelled to sell their superfluous land within ten years, yet if within that time they make the attempt to sell, the right of an adjoining owner to claim the benefit of pre-

RAILWAY—*continued.*

emption at once arises.—Such land must, under sect. 128 of the statute, be first offered to persons whose lands, or some of them, have been taken in virtue of the company's act, or who are "owners of the land adjoining."—Where, by agreement, a wall has been built on land dividing the property of an individual from that of the company, and the individual and the company are, by the same agreement, the joint owners of the land on which the wall is built, that circumstance does not affect the individual, so as to prevent him from being considered an "adjoining" owner.—Where an adjoining owner claimed from a railway company a right of pre-emption of certain lands which the company was about to sell, such lands never having been his, nor severed from any part of his estate, the House, while affirming his right to make this claim, directed an inquiry whether there was any other adjoining owner who was equally entitled with himself to make such claim. London and South Western Railway Company *v.* Blackmore - 610

4 —— An agreement to arise and take effect on the passing of a bill then pending in Parliament is to be regarded, by virtue of that stipulation, as if it had been *de facto* made after the passing of the bill. Taylor *v.* Chichester and Midhurst Railway Company - - 628

If an agreement to take and pay for land, made by the directors of a railway company, before the passing of an Act to authorize a work which is the subject of that agreement, is valid, its validity will not be affected by the fact that a part of such agreement relates to compensation for annoyance which cannot happen if the land itself is not required to be taken. *Id.*

An agreement by which directors of a railway company bind themselves, in the event of their bill passing, to take land for the purpose of making the railway, and to pay for it within three months after the passing of the bill, is valid, and its stipulations become enforceable after the passing of the bill. *Id.*

An existing railway company authorized by Act of Parliament to enter on a new undertaking and to add the new undertaking to the old, and to treat the capital intended to be raised for the new undertaking as capital added to the old, is thereby authorized (should it be unable successfully to raise the new capital, which is a matter not to be assumed) to apply to the new undertaking the funds previously applicable to the old. *Id.*

The 73rd section of the 8 & 9 Vict. c. 18, does not affect the validity of a contract made between railway directors and a person who has not an absolute estate in the lands which are the subject of the contract. He is perfectly competent to contract, whatever may be the grounds of his demands. The section applies as between him and the reversioner or remainderman. The money when paid to him becomes affected by a trust, he being the trustee, and the other persons being his *cestuis que trust.* The directors may pay the money into the Court of Chancery, and such payment will, under the Act, be a fulfilment of the contract to pay it to the tenant for life, and the Court of Chancery has full power to allot to the tenant for life, or

RAILWAY—*continued.*

other person having only a partial or qualified estate, a portion of the sum, so paid into the bank, as compensation for any injury or annoyance he may sustain. Taylor *v.* Chichester and Midhurst Railway Company - - - 628

REASONABLE AND PROBABLE CAUSE.] It is a rule of law that the jury must find the facts on which the question of reasonable and probable cause depends, but that the Judge must then determine whether the facts found do constitute reasonable and probable cause. No definite rule can be laid down for the exercise of the Judge's judgment. Lister *v.* Perryman - - 521

Per The Lord Chancellor [*Hatherley*], Lord *Westbury*, and Lord *Colonsay*:—It is desirable that reasonable and probable cause should be an inference of fact for determination by the jury rather than by the Judge. *Id.*

L. was the owner of a rifle, which was left in the care of his coachman, *H.* The rifle had been seen and admired by *P.*, who said he wished he had one like it. It was stolen. *H.* told that fact to *L.*, his master, and at the same time informed him that *R.*, the coachman of a near neighbour, said he had seen it in a barn belonging to *P.'s* father, that *P.* hearing of this statement denied it, and offered to take *H.* and *R.* to the barn and shew them the gun he had there, that he did take them to the barn and shewed them a gun (which was not *L.'s* gun), and that *R.* said that was not the gun he had previously seen in the barn. *L.* caused *P.* to be apprehended for felony. *P.* was tried and acquitted, and brought an action for a malicious prosecution. Whether *L.* saw *R.* before, or only after, the apprehension, was a matter of contradictory evidence at the trial. The jury found that he had not seen *R.* before ordering *P.'s* apprehension. The Judge directed the jury that that being so, he considered *L.* to have acted on hearsay evidence alone, and therefore without reasonable and probable cause, and consequently that *P.* was entitled to the verdict:—*Held* (reversing the judgment of the Exchequer Chamber), that this was a misdirection, and that there must be a new trial. *Id.*

RECORD: *See* Practice. 2.

REFUND: *See* Madras Civil Service Fund.

RELEASE: *See* Railway. 3.

General words in a release are limited to those things which were specially in the contemplation of the parties when the release was executed. London and South Western Railway Company *v.* Blackmore - - - - - 610

REM, JUDGMENT IN: *See* Foreign Court.

REMITTER: *See* Argument.

RESCINDING CONTRACT: *See* Contract; Winding-up.

ROYAL PALACES.] There is a distinction between a royal palace and a royal palace which is also a royal residence. *Hampton Court Palace* is a royal palace, but not a royal residence, and therefore is not exempt from execution, within it, of civil process.—The Sovereign does not, in fact, reside there; and the circumstances that the chief officials and the chaplain, together with the housekeeper and the gardener, are all appointed by the

ROYAL PALACES—*continued.*

Crown, and paid out of the civil list—that a pew is always kept in the Chapel ready for the royal use—that certain apartments there are known as "State Apartments" (though now used by Her Majesty's permission as picture galleries, in which pictures, the property of the Crown, are exhibited to the free inspection of the public)—that a guard of honour is always posted there—that the inmates, to whom the Sovereign has graciously granted the use of apartments, hold such apartments entirely at the pleasure of the Crown, and could be displaced at a moment's notice—and that the grapes grown in the Vinery are always kept for the service of Her Majesty's table, do not constitute it a royal residence, so as to confer the exemption upon it. *Per* Lord *Chelmsford* and Lord *Colonsay; diss.* The Lord Chancellor (Lord *Hatherley*).—Where, therefore, a *fi. fa.* had been levied in some of the apartments in the Palace; *Held*, that the sheriff was not liable to an information for intrusion. ATTORNEY-GENERAL *v.* DAKIN - - - - - - 338

ROYALTY.] *L.*, the owner of land with mines underneath the surface, granted a lease of part of his land known as *A.*, and the mines under it, to a company known as *P.*, carrying on the manufacture of iron. The lease contained this covenant: "yielding and paying to the lessor, his heirs, &c., for every quantity of 2520 lbs. of coal, ironstone, &c., the produce of any lands or mines not intended to be included in the present demise, but which shall be raised within the distance of twenty miles from any part of the premises hereinbefore expressed to be demised, and shall be brought *through*, *over*, or *under* the said lands, &c., the royalty or sum of one halfpenny." *P.* afterwards granted an underlease of a part of the surface of the land *A.* to a railway company, which made sidings thereon, for the purpose of more conveniently and safely shunting trains for a time, before forwarding them to their destination. Trains containing minerals raised within the twenty miles (often mixed with minerals in no way coming within the words of the covenant, and sent by other companies upon the line) were frequently, for safety and convenience, shunted for a time on the sidings formed on the land *A.*, and afterwards taken out and conveyed to their destination:—*Held* (affirming the judgment of the Court below), that the minerals raised within the described distance did come within the words of the covenant, even though brought on the land only for the temporary purpose of being shunted there, and were therefore liable to the payment of the royalty. GREAT WESTERN RAILWAY COMPANY *v.* ROUS - - - 650

"SAME CIRCUMSTANCES:" *See* EQUALITY CLAUSES.

SCOTLAND: *See* WILL. 4.

SETTLEMENT: *See* ELDEST SON; PEERAGE.

SHERIFFS' LEVIES: *See* ROYAL PALACES.

SHIFTING CLAUSES: *See* ELDEST SON; PEERAGE.

SOUTHAMPTON DOCKS.] A direction in a mandamus to take measures for "obtaining and recovering payment" does not necessarily mean to bring an action, and such a direction, therefore, though not accompanied by a tender of indemnity does not make the mandamus invalid.—The Acts which regulate the port and docks at *Southampton* do not take away from the Mayor and Corporation of that town the right to receive the compensation originally granted to them in respect of the loss of petty customs and anchorage and groundage dues which, before the passing of these Acts, they were entitled to receive; nor is their right to that compensation affected by the fact that the *Municipal Corporations Act* directs all their funds to form part of a borough fund, which is to be employed and applied to the purposes and in the manner provided for by that statute.—Certain payments were (by clauses in local Acts of Parliament) under certain circumstances, to be made by a body of persons owning the docks of a town to another body of persons constituting the Commissioners of the port of that town, out of which payments one-fifth was to be handed over to the Corporation of the town. For this uncertain sum of one-fifth a certain sum of £1000 was afterwards substituted. From circumstances provided for by the local Acts which regulated these matters the Commissioners did not receive, and, in consequence of other circumstances connected with the docks and the town, did not attempt to enforce, payment of the moneys from the Dock Company. The Corporation sought to compel the Commissioners to continue the payment of what was or might have been received, on an amount calculated on a recognised deficiency, and obtained a mandamus for that purpose. The mandamus alleged that the Commissioners had been required by the Prosecutors (the Mayor and Corporation) "to take the necessary and legal measures for obtaining and recovering payment to them of the said deficiency and to pay over, &c.,' and it went on to enjoin the Commissioners to take "the necessary and legal measures and proceedings" for obtaining and recovering payment, &c. It did not allege any tender of indemnity to the Commissioners for the possible costs of doing what was there required:—*Held*, that the mandamus was sufficient in form that it did not necessarily imply that the Commissioners were to bring actions to recover the money; and that, consequently, there was no necessity to accompany it with the offer of an indemnity as to costs.—Where Commissioners are by an Act of Parliament, authorized to receive certain money, and at the same time directed to pay a portion of those moneys to another body of persons, the gross sum received is to be deemed the "income" of the Commissioners, and the persons to whom the payment is to be made have an "interest" in that portion, and are entitled to enforce payment thereof. THE QUEEN *v.* THE COMMISSIONERS OF THE PORT OF SOUTHAMPTON 44

STATUTES:

27 Eliz. c. 4 - - - -	48
41 Geo. 3, c. 109 - - - -	37
43 Geo. 3, c. xxi. - - - -	45
50 Geo. 3, c. clxviii. - - -	45
1 & 2 Geo. 4, c. x. - - - -	37
6 Will. 4, c. xxix. - - - -	45
6 & 7 Vict. c. lxv. - - - -	45

STATUTES—*continued.*

7 & 8 Vict. c. iii.	226
8 & 9 Vict. c. 18	171, 610, 628
8 & 9 Vict. c. 20	172, 227
11 & 12 Vict. c. xviii.	317
22 & 23 Vict. c. 21	100
24 & 25 Vict. c. 134	661
24 & 25 Vict. c. clxiv.	171
25 & 26 Vict. c. 63	317

STOP ORDER: *See* Bill of Lading.

SUCCESSION: *See* "Eldest Son;" Administration.

SUFFERANCE WHARF: *See* Bill of Lading.

The Acts relating to landing goods at a sufferance wharf were intended for the protection of the shipowner. Barber *v.* Meyerstein - 317

"SUPERFLUOUS LANDS:" *See* Railway. 3.

Where a company having purchased land for the purposes of its railway, after using some of the land, sells the rest, calling it in the advertisement and particulars "surplus land;" this form of sale must be deemed a declaration that the land sold is "superfluous land" within the meaning of 8 & 9 Vict. c. 18, s. 127.—Though the directors of a railway company are not compelled to sell their superfluous land within ten years, yet if within that time they make the attempt to sell, the right of an adjoining owner to claim the benefit of pre-emption at once arises.—Such land must, under sect. 128 of the statute, be first offered to persons whose lands, or some of them, have been taken in virtue of the company's act, or who are "owners of the land adjoining." London and South Western Railway Company *v.* Blackmore 610

SURFACE OF LAND: *See* Inclosure Acts.

TECHNICAL WORDS: *See* Will.

It is not desirable to multiply words having the same technical meaning, by introducing one which never had such a meaning, where another exists with that technical meaning already appropriated to it. Massy *v.* Rowen - - 288

TEDDINGTON: *See* Town.

TEMPORARY INJURY: *See* Railway. 2.

TENANT FOR LIFE: *See* Railway. 4.

TIME: *See* Contract. 1; Eldest Son; Misrepresentation. 1.

TOLL.] However commodious a place may be for the shelter of vessels, it will not therefore be a port, the establishment of which must be by authority of the Crown.—But, if so established, then, whether naturally or artificially formed, so as to shelter vessels, a consideration for anchor dues arises.—Where it had been found on inquisition in the reign of *Edward* I. that a grantee of the Crown had had "from time whereof memory is not . . . wreck of the sea and toll with merchandize in the manor," and in the reign of *Edward* II. proclamations had been made to seize, in certain places (of which this manor was named as one), "where ships ply by the coast," &c., letters coming from abroad—and in the reign of *Elizabeth* a return to a Royal Commission mentioned the manor as a creek of one of the *Cinque Ports*, and many documents, some of them grants from the Crown, and others deeds under which the manor had from time to time been enjoyed, spoke of "tolls," and

TOLL—*continued.*

deputations had been issued by the owners of the manor to collect the tolls of all vessels anchoring there, and tolls had been so collected beyond the time of living memory, and a private Act of Parliament had adopted these expressions in authorizing the conveyance of the manor to a company thereby incorporated:—*Held*, that there was enough to justify the inference that a port did exist, and that a toll claimed as a port or anchorage toll, had a legal origin. Foreman *v.* Free Fishers of Whitstable - - - 266

TONNAGE CHARGE: *See* Equality Clause; Railway. 1.

TOWN.] *Quære*, Whether *Teddington*, in the county of *Middlesex*, is a "town" within the meaning of the *Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 18), s. 128? The lands near it, situated close to the railway station, and not continuously built upon, are not lands within a town, nor lands used for building purposes, within the meaning of that section. London and South Western Railway Company *v.* Blackmore 610

TRUST.] *C.* made a will leaving his whole property, real and personal, to *G.*, whom he also appointed his executor. When about to die, *C.* sent for *G.*, and, in a private interview, told him of the will, and on *G.*'s asking whether that was right, said he would not have it otherwise. *C.* then told *G.* where the will was to be found, and that with it would be found a letter. This was all that was known to have passed between the parties. The letter named a great many persons to whom *C.* wished sums of money to be given and annuities to be paid; but it contained several expressions as to *G.* carrying into effect the intentions of the testator as he "might think best," and this sentence, "I do not wish you to act strictly on the foregoing instructions, but leave it entirely to your own good judgment to do as you think I would, if living, and as the parties are deserving; and as it is not my wish that you should say anything about this document, there cannot be any fault found with you by any of the parties, should you not act in strict accordance with it." *G.* paid money to some of the persons mentioned in the letter, but not to all:—*Held*, that in this case there was not any trust created binding on *G.* McCormick *v.* Grogan - - - 82

VIBRATION: *See* Railway. 2.

VOIDABLE: *See* Contract.

VOLUNTARY SETTLEMENT AND VOLUNTEERS.] Where a voluntary settlement has been made, subsequent judgment creditors of the settlor cannot acquire rights in derogation of it which the settlor himself would not have possessed. A Court of Equity will not interfere actively against a volunteer through the medium of a person (not a purchaser for value) claiming only through him who has created the voluntary settlement. Dolphin *v.* Aylward - 486

WAIVER: *See* Penalty.

If, in a case, in which an agreement is made to accept a smaller in satisfaction of a larger sum, it is one of the stipulations that a mortgage is to be given on a certain day, and it is not given till two days afterwards, and is then accepted by the cre-

WAIVER—*continued.*

ditor, such acceptance, though a waiver as to the mortgage, is not a waiver of the creditor's general rights on the contract. Thompson *v.* Hudson 1

WILL.

1. Where an estate has been plainly given in a will, it is not, from the use of subsequent words, to be treated as given upon a condition, if those subsequent words are capable of being interpreted, not as a condition imposed, but as a mere description of the event on which the gift is to come into existence.—*W.* devised to his brother *C.* for life, and in default of *C.* having issue living at the time of his death to his next brother *F. B.* for life, and in default of *F. B.* having issue living at the time of his death, to his youngest brother *P.* in fee. The testator then described how *C.'s* children should take (namely, in tail male), and went on thus: "And in case *F. B. should come to the possession* of the said estate hereinbefore limited to him, and should die leaving issue, said issue to take in like manner" as before limited to the issue of *C. F. B.* died in the lifetime of *C.*, leaving a son. *C.* died some years afterwards without issue:—*Held*, that the words "should come to the possession" did not constitute a condition which, not having happened, prevented *F. B.'s* son from taking under the will and so created an intestacy, but that he took under the force of the limitation created in favour of his father. Edgeworth *v.* Edgeworth - - - 35

2. —— *C.* made a will leaving his whole property, real and personal, to *G.*, whom he also appointed his executor. When about to die, *C.* sent for *G.*, and, in a private interview, told him of the will, and on *G.'s* asking whether that was right, said he would not have it otherwise. *C.* then told *G.* where the will was to be found, and that with it would be found a letter. This was all that was known to have passed between the parties. The letter named a great many persons to whom *C.* wished sums of money to be given and annuities to be paid; but it contained several expressions as to *G.* carrying into effect the intentions of the testator as he "might think best," and this sentence, "I do not wish you to act strictly on the foregoing instructions, but leave it entirely to your own good judgment to do as you think I would, if living, and as the parties are deserving; and as it is not my wish that you should say anything about this document, there cannot be any fault found with you by any of the parties, should you not act in strict accordance with it." *G.* paid money to some of the persons mentioned in the letter, but not to all:—*Held*, that in this case there was not any trust created binding on *G.* McCormick *v.* Grogan - 82

3. —— The word "sole," in a will, has not a fixed technical meaning, throwing on the person who contests that meaning the necessity of shewing, by implication, that it is not used in the particular instrument in its strict technical sense. In a marriage settlement it may, from the circumstances of the case, have a particular and exclusive meaning attached to it. Massy *v.* Rowen 288

4. —— The expression in a will "all my just debts" includes all the testator's debts whenever and wherever contracted, and therefore includes a debt contracted by him after the making of the will, and contracted in a country other than that of his domicil, and secured upon property situated in that other country.—The burden of shewing that the words have a less extensive meaning lies on him who asserts their restricted operation.—A Scotchman domiciled in *England* had a Scotch estate, *G.*, he made a "trust disposition and settlement," in the Scotch form, of this estate, creating thereby certain charges upon it, and giving it, subject to those charges, to his eldest son. A Scotch "trust disposition and settlement" is equivalent to an English will, and three years afterwards he made a codicil to it, revoking one of the charges. He was possessed of considerable property in *England* as well as of this estate in *Scotland*, and shortly after making this codicil he made an English will, declaring it to be his last will "as to all property real or personal" of which he was capable of disposing by English law. He declared that the provisions of this will were not in any manner to affect the *G.* estate, or to put to election persons who might be entitled both under the trust disposition and under the will. He directed the trustees under his will to sell, &c., "all the residuary real and personal estate," and out of the moneys which should come to their hands by virtue of the residuary devise and bequest "to pay and discharge all my just debts, funeral and testamentary expenses," &c. He became entitled to the interest for his own life of a sum of money which was afterwards to go to his children; he induced the trustees of that money to let him have the money itself on his executing to them, in the Scotch form, a heritable bond which, by the law of *Scotland*, made the Scotch estate, *G.*, a security for the amount:—*Held*, that this sum so borrowed from the trustees, and secured by heritable bond on the estate of *G.*, was a "debt" within the meaning of the direction to pay all the testator's just debts contained in the English will; and that, consequently, the residuary personal estate of the testator was liable to discharge it in exoneration of the Scotch real estate of *G.*—As the testator had himself been the occasion of the difficulty in carrying the will into effect, and as this was an administration suit, the costs were ordered to come out of the fund. Maxwell *v.* Maxwell - - - 506

5. —— The general intent of a testator in creating an executory trust for a settlement of his property, not any strictly technical meaning attached to the words he has used, is to govern the preparation of the settlement. West *v.* Holmesdale - - - - - 543

The manner of executing an executory trust must be guided by the object of the author of the trust, provided such object is one which can be legally effectuated. *Id.*

There is no difference between the construction to be put on an executory trust created by marriage articles and on an executory trust created by a will, except so far as the former, by its very nature, furnishes more emphatically the means of ascertaining the intention of those who created the trust. *Id.*

Where, therefore, a codicil to a will clearly indicated the intention of a testator to annex estates and moveables to a peerage, to correspond

WILL—*continued.*

as nearly as might be with the limitations in the patent, though the words creating the trust, and directing what should be done by the trustees, appeared to require that an estate tail should be given to the first holder of the peerage, those words were held to be explained and overruled by the expression of the general intent, and a life estate alone was given to him. West *v.* Holmesdale - - - - - - - 543

But to this life estate were appended (in order to satisfy the general intent of the testator) the conditions that the tenant for life should be without impeachment for waste, and that he might, to the extent specified in a will which the codicils recited (but for certain purposes revoked), charge the property with a jointure for his wife, and provide portions for younger children. *Id.*

A. made a will, by which she devised her freeholds at *K.*, &c., to trustees, on trust for her sister *D.* for life, and after the death of *D.* to *W.*, the eldest son of *D.*, for life, without impeachment of waste, remainder to his sons successively in tail male, and, in the like manner, to the third, fourth, and other sons of *D.*, and their sons, omitting altogether *D.'s* second son. She bequeathed copyholds, leaseholds, and chattels (the last to go as heir-looms with the freehold at *K.*) to the same trustees, "upon such trusts as would best correspond" with those before mentioned concerning the freehold. The Crown afterwards granted a barony to *D.* for her life, and after her death to *R.*, her second son, and the heirs male of his body, remainder to the third, fourth, and other sons of *D.* in like manner. The patent contained a shifting clause by which, in certain events, the barony was to go over. Immediately after the grant of the barony *A.* made a Codicil by which, so far as related to the freehold estate at *K.*, and the leaseholds, copyholds, and chattels, the will was revoked, and she declared her intention to be to give all the freeholds, leaseholds, and chattels to trustees (not those originally named in the will, but others), in trust to settle them "in a course of settlement to correspond, as far as may be practicable, with the limitations of the barony;" and she directed these trustees to convey, settle, and assure the same "in a course of entail to correspond, as nearly as may be, with the limitations of the barony, and the provisoes affecting the same, in such manner and form, and with such powers, &c., as the trustees shall consider proper, or as their counsel shall advise." Except as altered by the Codicil the will was confirmed. On a bill to carry this trust into execution, the Court below had held that *D.* took a legal estate in the freeholds for life, and that *R.* was entitled to them for an estate in tail male, and gave directions accordingly.—On appeal, *Held* (*diss.* Lord *Hatherley*, Lord Chancellor) that the estates ought to be limited in a course of strict settlement to the second and other younger sons of *D.* for their respective lives, without impeachment of waste, with remainder to their sons successively in tail male in the order mentioned in the letters patent creating the barony; and that the copyholds, leaseholds, and chattels were to go in a similar manner so far as the rules of law and equity would allow; and that the settlement ought to contain powers of jointuring, and of charging portions. West *v.* Holmesdale - - 543

Quære, whether the shifting clause in the letters patent was valid—But, declared that the settlement must contain a shifting clause in accordance with it. *Id.*

WINDING-UP: *See* Misrepresentation.

If, before a winding-up order is made a person files a bill against a company alleging that he had been induced by fraud and misrepresentation to become a member of the company, and on that ground praying to have his name removed from the lists of its members, he will (on establishing his allegations) be entitled to have his name removed from the lists of the company, although between the date of his filing his bill and the decree of the Court upon it, an order has been obtained to wind up the company.—Where a contract is voidable, but not void, it remains valid till it is rescinded.—This rescission is not confined to the time of the order of the Court declaring the contract void, but relates to the period when, by filing a bill for its rescission, a party has duly taken steps to rescind it.—The 98th section of the *Companies Act*, 1862, gives the Court full power to rectify the list of contributories as well after as before the date of the winding-up order. Reese River Mining Company *v.* Smith - 64

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—— "Building lands" - - - 610

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—— "Eldest son" - - - - 43

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—— "Separate" - - - - - 288

—— "Sole" - - - - - 288

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